# 92-231

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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COMMUNITIES, INC.;
DULWORTH & RIVES, INC. PETITIONERS

v.

JAMES B. BUSEY, Administrator,
Federal Aviation Administration;
FEDERAL AVIATION ADMINISTRATION RESPONDENTS

AND

COMMUNITIES, INC. PETITIONER

v.

SAMUEL K. SKINNER, Secretary of the
United States, Department of
Transportation; UNITED STATES
DEPARTMENT OF TRANSPORTATION RESPONDENTS

REGIONAL AIRPORT AUTHORITY OF
LOUISVILLE AND JEFFERSON
COUNTY, KENTUCKY INTERVENOR-RESPONDENTS

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**PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Does Section 4(f) of the Department of Transportation Act as interpreted by the Supreme Court permit a court to affirm FAA approval of a transportation project that destroys certain park and historic resources and constructively uses others, where the record indicates there are one or more alternatives that meet transportation needs, cost less, disrupt the community less and destroy no 4(f) resources?

2. Does Section 4(f) of the Department of Transportation Act as interpreted by the Supreme Court permit the Secretary of the Department of Transportation to reject the "no-build" alternative without determining whether not building the project will be "imprudent"? Supreme Court review is requested to resolve a conflict in the Circuit Courts of Appeal.

3. Was the FAA arbitrary and capricious not to supplement its FEIS following the Kentucky Supreme Court decision in Prestonia and following agreement with EPA to do single event noise analysis?

4. Does the record before this Court reflect sufficient factual basis for the agency conclusions to satisfy the "hard look" requirement of NEPA as enunciated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)?

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Communities, Inc. and Dulworth & Rives, Inc. Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit,

affirming the approval by the Secretary of Transportation of the Louisville Airport Improvement Plan ("LAIP").

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Communities, Inc., et al. v. James B. Busey, Admin., et al., 1992 U.S.App. 6210 (6th Cir. 1992).

**JURISDICTION**

Judgment and the opinion of the court were entered February 13, 1992. The Court of Appeals denied Petitioners' Petition for Rehearing by Order entered April 3, 1992. Petitioners filed a petition pursuant to Supreme Court Rule 13.06 for extension of time within which to file this petition, which extension was granted by Order of the Supreme Court on July 1, 1992. Jurisdiction is sought under 28 U.S.C. 1254(1). Jurisdiction in the Court of Appeals was based on 49 U.S.C. §1486 and 28 U.S.C. §1631.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The National Environmental Policy Act of 1969, Section 102, 42 U.S.C. §4332, in relevant part.
- Title 49 U.S.C. §303, in relevant part.
- The Airport and Airway Improvement Act, 49 U.S.C. §2208, in relevant part.
- United States Department of Transportation, Federal Aviation Administration, Order 5050.4A Airport Environmental Handbook ¶ 83 (Oct. 8, 1985), in relevant part.

The pertinent text of these provisions is contained in the Appendix, A-39 through A-43.

## STATEMENT OF THE CASE

This litigation presents the Supreme Court with a dispute between an agency of the federal government (Federal Aviation Administration, hereinafter "FAA") supported by a local quasi-governmental agency (Regional Airport Authority of Louisville and

Jefferson County, Kentucky, hereinafter "RAA") on the one hand, and citizens, businesses and property owners (including two small municipalities) who have been and will be affected by the governmental decisions on the other hand. The project giving rise to this conflict is the proposed expansion of Standiford Field (SDF) in Louisville, Kentucky. Like all such conflicts, there is the potential for parochial self-interest on the part of the citizens, and there is also the potential for arbitrary and capricious action on behalf of the government, meaning here the manipulation of data and reliance on conclusory analysis to justify a preordained course of action, and the lack of good faith, both in affording fair process and an opportunity to be heard, and in consideration of the information of record.

There is also the potential that the governmental agencies acted in good faith based on the best information available to

them at the time of their decision, but that they ended their analysis too soon because they perceived a need to prevent an airline passenger capacity crisis before it happened. And, there is also the potential that those citizens and businesses who have not yet been displaced and those historic and park resources not yet demolished as well as those citizens and businesses who now anticipate new significant noise impacts and those currently unaffected parks, historic resources and wildlife resources that today anticipate significant adverse noise impacts may be spared such demolition and such impacts.

The proposed expansion of Standiford Field was originally touted as necessary to meet projected airline passenger needs based on a consultant's analysis of passenger enplanements for three years - 1985, 1986, and 1987, which the consultant used to justify projecting increased passenger growth

at the rate of eight percent per year, projecting passenger enplanements in 1990 to reach 1,370,000 and capacity problems for the year 1992 based on projections of 274 arrivals and 274 departures each day. In fact, passenger enplanements have remained flat in Louisville for a twenty-year period with 1990 enplanements actually being 1,041,784, less than the 1987 passenger enplanements. The U.S. Court of Appeals for the Sixth Circuit recognized that the project was no longer touted as an airline passenger project. At the time of oral argument in September, 1991, its proponents conceded the project to be simply an airline cargo project. Communities, Inc. v. Busey, Opinion at 3.

However, even the record of airline cargo operations, when subjected to the required "hard look" does not support the FAA conclusion that the expansion is needed. The most current evidence of record shows that

air cargo operations peaked in 1985 at 36,260 and dropped to 31,400 in 1987. It is very intriguing that this data is not presented in the final environmental impact statement (EIS) published in 1990. Instead, the EIS "estimated" that 1987 cargo operations would be 37,450.[1]

Petitioners' brief to the Court of Appeals cited the most recent data of total aircraft operations which revealed that in January-February 1991, operations were averaging 230 arrivals and 230 departures each day. Petitioners' Court of Appeals Brief, Addendum, B-4. Petitioners attach hereto at Appendix A-45 the most recent data as of this date, which reveals that in April-May 1992 the total operations, including air cargo, averaged 215 arrivals and 215 departures each day.

It is one thing for municipal boosters

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[1] Petitioners' Court of Appeals Reply Brief Addendum R-1.

to "puff" up the community pride with rosy projections about future growth. However, when these projections become a tool to destroy people's homes, businesses, churches and schools, as well as parks and historic resources, the judicial process must intervene to help distill real community needs from puffing. The Court of Appeals helped this distillation but did not complete the "careful and searching" inquiry.

An even more egregious manipulation of data occurred in the agency evaluation of social, economic, land use and cultural resource effects of the LAIP. When the RAA consultant began to evaluate alternatives, the early analysis revealed that Alternative 5C (which became the LAIP) would destroy 1,420 homes, relocating 3,450 residents. In comparison, Alternative 3E would destroy 289 dwellings, relocating 795 residents and Alternative 4 would destroy 332 dwellings, relocating 1000 residents. Only Alternative

5C would demolish 16 existing churches. See Appendix A-47.

Under the "hard look" mandate of Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), the public and the FAA should have carefully evaluated "irreversible and irretrievable commitments of resources which would be involved in the proposed action...." 42 U.S.C. §4332(C)(iv).

Instead, the FAA accepted the RAA suggestion to categorize the "Dislocation of 1,440 +/- dwelling units, 3,500 +/- persons, 15 churches and 60+ businesses as part of the "No Action Alternative" in the EIS because this would result from the City's use of its "urban renewal" authority. As a result the "additional" dislocations caused by the LAIP artificially appeared to be minimal, a mere 150 homes, one more church and 40+ businesses. EIS, Table 1-1.[2]

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[2] Note that Table 1-1 continues to refer to the urban renewal program even though the Kentucky Supreme Court had earlier decided in

Petitioners requested the FAA to supplement the final Environmental Impact Statement once the "urban renewal" sham was reversed by the Kentucky Supreme Court in Prestonia Area Neighborhood Association v. Abramson, Ky., 797 S.W.2d 708 (1990). The Court found in Prestonia that the City of Louisville's declaration that three neighborhoods slated for demolition to make room for the airport expansion as "blighted" was unsupported by substantial evidence, and an arbitrary use of governmental authority in violation of Kentucky Constitution § 2.

Petitioners also requested the FAA to supplement the EIS after single event noise data was revealed for the first time in the final EIS and the FAA declined. This data, included at EPA's insistence, showed dramatic noise increases in previously relatively

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Prestonia Area Neighborhood Association v. Abramson, Ky., 797 S.W.2d 708 (1990), that urban renewal authority could not be used for the demolition of these neighborhoods.

quiet areas including several historic residential districts.

The Petitioners have vigorously questioned the need for and purpose of the airport expansion to alert the FAA of their concerns as required by Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). However, Petitioners have never had the opportunity to judicially "test" the claims of the RAA as accepted by the FAA. Petitioners have challenged the agency evaluation of alternatives, but have not had the opportunity to question the RAA consultant's evaluation of these alternatives.

Petitioners sought to proceed against the Secretary of Transportation in U.S. District Court in order to be able to introduce evidence and to cross-examine ("test") the evidence relied upon by the FAA. But this action was dismissed for lack of

jurisdiction.

Petitioners' only hearing to date has been the original action before the U.S. Court of Appeals for the Sixth Circuit. That court accepted Petitioners' argument that the expansion of the airport could not be justified based on passenger enplanements but rejected Petitioners' argument that the evidence of air cargo operations was also inadequate to justify expansion of the airport at this time. Petitioners now seek a "careful and searching" inquiry into the evidence of need for additional capacity, a determination by this Court that serious questions of Department of Transportation Act Section 4(f) and National Environmental Policy Act ("NEPA") compliance have been raised justifying consideration by the Supreme Court. Petitioners seek a determination by this Court that the FAA should reopen the NEPA and 4(f) inquiry to re-examine the alternatives in order to meet

the real airline needs for Louisville without unnecessary impact on citizens, businesses, parks, historic resources, and wildlife resources that are proximate to Standiford Field.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE COURT OF APPEALS CANNOT BE RECONCILED WITH THE REQUIREMENTS OF SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT AS INTERPRETED BY THE U.S. SUPREME COURT IN CITIZENS TO PRESERVE OVERTON PARK v. VOLPE.

In 1966, Congress adopted the Department of Transportation Act which contained at Section 4(f) a congressional mandate concerning the protection of public parks, recreational areas, wildlife or waterfowl refuges and historic sites of national, state or local significance, which mandate has become known as the Section 4(f) mandate. 82 Stat. 824, 49 U.S.C. Section 1653(f). In 1968, Congress enacted the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. Section 138, which Act contained at Section

18(a) language virtually identical to the Section 4(f) language referenced above. These two sections, Section 4(f) of the Department of Transportation Act of 1966 and Section 18(a) of the Federal-Aid Highway Act of 1968 were interpreted in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

The law governing airport expansion appears in the Airport and Airway Improvement Act of 1982. This Act was originally enacted as the Airport and Airway Development Act of 1970. When Congress reenacted the law in 1982, Congress provided at Section 10(d) a requirement of "no feasible and prudent alternative" that closely parallels the original Section 4(f) requirement and that has been interpreted by the FAA to require an equivalent analysis. FAA Order 5050.4A ¶ 83b, c, d. This requirement appears at 49 U.S.C. Section 2208(b)(5) in the Airport and Airway Improvement Act of 1982.

Congress has spoken concerning limits to the discretion of the Secretary of Transportation acting through the FAA to approve airport expansion plans. This directive has been interpreted by the United States Supreme Court and Congress has subsequently reaffirmed the original directive given to the agency. The Congressional reaffirmation of the statutory requirements as enunciated by this Court in the Overton Park decision must therefore guide the public, governmental agencies and this court's interpretation of the legal significance of facts presented to determine compliance with these referenced statutes. Miles v. Apey Marine Corp., ___ U.S. ___, 111 S.Ct. 317, 325 (1990); Cannon v. University of Chicago, 441 U.S. 677 (1979).

Section 4(f) of the Department of Transportation Act provides "clear and specific directives" to the Secretary of Transportation, in this case acting through

the FAA. Overton Park, 401 U.S. at 411. The Secretary's decision will be set aside if the court determines that it is arbitrary, capricious or an abuse of discretion. 401 U.S. at 416. To determine whether the Secretary has abused his discretion, a reviewing court must make three determinations:

1. Whether the Secretary acted within the scope of his authority and "whether on the facts the Secretary's decision can reasonably be said to be within that range." Id. at 415-16.

2. Because Section 4(f) prohibits the "use" of park land or historic resources if feasible and prudent alternatives are available, "the reviewing court must be able to find that the Secretary could have reasonably believed that...there are no feasible alternatives or that alternatives do involve unique problems." Id. at 416.

3. If the Secretary acted within his

scope of authority, the reviewing court must consider whether the Secretary's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id.

The factual inquiry by the reviewing court is to be "searching and careful" although the standard of review is "narrow." Id.

Although the Secretary acknowledged that his authority to approve the use of 4(f) properties was prohibited if feasible and prudent alternatives were available, Petitioners maintain that the Secretary's finding that no such alternatives exist was unreasonable and was an abuse of his discretion. The decision reflects a failure to consider all relevant factors in the record before the agency and is a clear error of judgment.

In the EIS and Record of Decision (ROD) the FAA concedes that the proposed action

would use protected 4(f) resources: (1) The James Lowell Elementary School will be demolished; (2) Grove Park will be taken and Highland Park Community Center will be demolished; (3) The historic residence at 2111 South Park Road and 20 buildings on the University of Louisville Belknap Campus located within the 65 Ldn noise contour will be used; (4) 11 other unnamed potential historic sites also located within the 65 Ldn contour will be used. EIS 1-19, JA 3549.[3]

The FAA considered other runway

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[3] Petitioners have maintained that the above list of 4(f) properties omits a substantial number of additional 4(f) protected resources including the 1700 properties located within the Old Louisville Historic District and Central Park that will be constructively "used" by noise (50 flights a day and 11 flights a night greater than 80 db - comparable to a diesel truck at 50 feet) generated by the LAIP. Petitioners have maintained that the record evidence that noise levels at the Falls of the Ohio Wildlife Refuge will double also constituted constructive "use" of this resource. However, the FAA's exclusion of these additional properties does not effect the answer to the first 4(f) inquiry.

configurations but made no finding that the other configurations would use 4(f) protected resources, nor made a record from which such a finding may be inferred. The record identifies no 4(f) resources which will be used by any of the structural alternatives. However, the record clearly reflects that the LAIP will displace park land and demolish historic buildings.

The Court of Appeals accepted the conclusion that Alternative 4 would "result in almost all flights passing over noise sensitive areas immediately east and west of the airfield." Residential properties are noise sensitive. The airport is surrounded by residential properties so any configuration will ultimately fly over noise sensitive areas.[4]

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[4] However, a careful review of Alternative 4 superimposed over an aerial photograph in "Working Paper #1" at JA 814 reveals that there are no residential properties immediately to the east or west of the proposed runway. On the east is the cloverleaf of I-65 and the Outer Loop highway

Frankly, it appears that the Court of Appeals erroneously equated the term "noise sensitive areas" with "4(f) resources". See Opinion at page 12, where the Court after discussing "noise sensitive areas" states: "Thus Petitioners fall far short of suggesting a feasible alternative that would not use 4(f) resources." In fact, the two terms and their legal significance are very different. With noise sensitive use, such as residential use, one option is acquisition of the property and relocation of the residents to another quieter location. But with 4(f) resources such as park lands or historic resources, acquisition and relocation are not appropriate remedies. With 4(f) resources the project is required to be designed to avoid or minimize the use.[5] Critical to any

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and on the west are industrial properties including the CSX observation house in the middle of a railyard.

[5] See Louisiana Environmental Society Inc. v. Coleman (LES II), 537 F.2d 79, 84 (5th Cir. 1976), "If there is another way,

court's analysis of agency compliance with 4(f) obligations is the analysis of the impact of alternatives on the protected 4(f) resources. **THERE IS NO EVIDENCE IN THE RECORD BEFORE THIS COURT THAT ALTERNATIVE 3E OR ALTERNATIVE 4 WILL USE ANY 4(f) PROTECTED RESOURCES.**

As to "feasibility", the Secretary concluded that some of the alternatives imposed "severe engineering requirements," however, no alternative was found to be incapable of being built as a matter of sound engineering, and the severe engineering requirements involved (relocation of industrial buildings) are also necessary to the construction of the LAIP. The other requirements mentioned, relocation or overpass construction for rail tracks and drainage ditches, are regularly employed in major constructions projects. The best indicator of engineering feasibility is cost.

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take it."

The record reflects cost was estimated using standard engineering cost estimate techniques. The cost of Alternate 4 is one-half of the LAIP and the cost of Alternate 3E is within 3% of the LAIP.

Although the record contains no evidence of "infeasibility", no evidence that any of the alternatives would use 4(f) resources, and no evidence that any of the alternatives involve disruptions of the community of the magnitude of the LAIP, the Court of Appeals' decision in this case concluded that there was a basis for the FAA finding that some alternatives were infeasible, and that some alternatives were imprudent, generally lumping all of the reasons together and referring to "the enormous record evidence on feasibility" which the Court of Appeals stated Petitioners ignored. Court of Appeals Decision, page 17.

Petitioners attached to their Petition for Rehearing the complete text of the

evaluation of Alternatives 3E and 4 in Technical Report 2 (JA 614 to 710) to demonstrate that no such "enormous record on feasibility" exists. In fact, the record completely lacks any hard evidence upon which the Secretary could have reasonably relied to support his conclusion that the alternatives are either infeasible, imprudent or result in the "use" of 4(f) resources.

In Overton Park the Supreme Court stated that Section 4(f)'s language "is a plain and explicit bar to the use of federal funds for construction of highways through parks - only the most unusual situations are exempted." Id. at 411.

The FAA was not presented with an unusual situation. The problems involved in implementing Alternatives 3E and 4 are typical of major construction.

Overton Park requires that 4(f) protected resources not "be lost unless there are truly unusual factors present in a

particular case or the cost or community disruption resulting from alternative routes reaches extraordinary magnitudes". Id. at 413.

The Court of Appeals' specific consideration of alternatives appears beginning at page 11 of the Opinion. The Court erroneously stated that the Petitioners failed to propose an alternative that would not use 4(f) resources. In fact, the Alternatives 1, 2A, 3E and 4 all are described as not displacing park resources. The LAIP, Alternative 5C, is the only alternative that the RAA studies indicate will displace or demolish 4(f) protected resources.

The Court of Appeals accepted the FAA conclusion that Alternative 4 is "extremely inefficient". What facts support this conclusion? Using the record described above as a reference, Alternative 4 cannot reasonably be rejected as imprudent.

Alternative 4 and the LAIP would generate equal increases in hourly capacity (to 108 maximum VFR operations, and 104 maximum IFR operations), equal annual service volume (313,000 aircraft operations), and identical aircraft delay numbers. Alternative 4 is identified as having no impacts on Section 4(f) properties (parks and archeological sites), as costing approximately $141 million, and as requiring the relocation of 332 residences, 1,000 persons, no churches, and 48 businesses.[6] In contrast, Alternative 5C (the LAIP alternative), is described as affecting several Section 4(f) properties, as costing $284 million, and as requiring the relocation of 1,420 residences, 3,420 persons, 16 churches and 102 businesses. Id. Further, Alternative 4 would utilize property which is already

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[6] Technical Report No. 3 at Table S-1, "Effects of Alternatives: Second-Level Screening." Court of Appeals Joint Appendix 000786.

generally zoned for industrial use, whereas Alternative 5C requires the rezoning of a significant amount of property from residential to industrial uses. Id.

Based on these comparisons alone, Alternative 4 has all of the benefits of Alternative 5C, with much less of an impact on sensitive resources and half of the cost. However, the EIS inexplicably and cavalierly rejects Alternative 4 with a brief two sentence paragraph: "Alternative 4 would be extremely inefficient and require closure of the Outer Loop landfill, which serves Jefferson County and five surrounding counties. Therefore, it was rejected."

The reasoning of this paragraph is grossly inadequate as a basis for rejecting an alternative. The closing of a landfill required for Alternative 4 is a reason to prefer, not to reject the alternative. FAA Guidance encourages the closing of landfills near airports. FAA Order 5200.5 (Oct. 16,

1974), provides as follows:

> "Various studies and observations have resulted in the conclusion that sanitary landfills are artificial attractants to birds. Accordingly, landfills located in the vicinity of an airport may be incompatible with safe flight operations. Those conditions that are not compatible must be eliminated, to the extent practicable.
>
> * * *
>
> Sanitary landfills will be considered as an incompatible use if located within areas established for the airport through the application of the following criteria:
>
> a. Landfills located within 10,000 feet of any runway used or planned to be used by turbojet aircraft.
>
> * * *
>
> d. Any landfill located such that it places the runways and/or approach and departure patterns of an airport between bird feeding, water or roosting areas.[7]

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[7] U.S. Dep't of Transp., Fed. Aviation Admin., Order 5200.5, FAA Guidance Concerning Sanitary Landfills On or Near Airports ¶¶ 3, 5 (Oct. 16, 1974). At oral argument, in response to a question from Judge Jones, counsel for the RAA for the first time

The second basis for rejecting Alternative 4, as described in the EIS, is that the alternative would be "extremely inefficient". Without more description, one may assume that the inefficiency inherent in Alternative 4 is that it would fail to satisfy fully the purpose of the proposed project. The purpose of the project, as articulated in this working paper (i.e. to provide improved passenger capacity at Standiford Field) is entirely different from the purpose of the project as articulated in the EIS and announced at oral argument, "This is a cargo project." Since UPS facilities are located at the south end of the airport property and since inefficiency for cargo operations has different parameters than passenger traffic inefficiency, it is obvious

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acknowledged that the life of the Outer Loop landfill may be as short as six years. This fact, which does not appear elsewhere in the record, is highly relevant to the feasibility of Alternative 4, but was revealed only after questioning from the court.

that the FAA did not examine the efficiency of Alternative 4. Alternative 4 is not imprudent when compared to the LAIP since it would aid in separating cargo and passenger operations, would aid in reducing operational costs for UPS, would reduce capital costs for the airport, and would likely allow operational flexibility which the LAIP precludes by removing the landfill hazard. In conclusion, the reasons provided in the EIS for rejecting Alternative 4 do not rise to the level of making it not practicable or infeasible or imprudent. See map at Appendix A-48 with LAIP, Alternative 3E and Alternative 4 displayed to illustrate.

Regarding the "prudence" of the alternatives, the Court of Appeals concluded by simply accepting the FAA assertion that unique problems exist, but the Court failed to identify what the unique problems are. The court stated that the alternatives "would not accomplish the goal of increasing

capacity at SDF". Opinion at page 17. But this conclusion is not supported by the evidence. All of the structural configurations increased capacity and Alternative 4 equals the capacity of the LAIP.

Petitioners have questioned the claims that the operations at SDF are growing at such a rate that the airport will exceed capacity by 1992. See discussion above at pages 5-8.

Where the evidence of need for additional capacity is as unpersuasive as presented here, the FAA cannot reasonably find the "no-build" alternative (or the "no-build until needed" alternative) to be an imprudent alternative to the use of 4(f) protected resources. In Stop H-3 Association v. Dole, 740 F.2d 1442 (9th Cir. 1984), the court required the Secretary to reanalyze the no-build alternative where population growth predicted in the EIS as justification for a

highway did not occur.

The "clear and specific" directives of Section 4(f) as enunciated by the Court in Overton Park requires the following:

**WHERE THERE IS AN ALTERNATIVE AIRPORT CONFIGURATION THAT PROVIDES THE TRANSPORTATION CAPACITY THE FAA DEEMS AS NEEDED AND IT COSTS MUCH LESS AND DISRUPTS A MUCH SMALLER PORTION OF THE COMMUNITY AND THAT ALTERNATIVE WILL USE NO 4(f) PROPERTIES, THE FAA IS FLATLY PROHIBITED AS A MATTER OF LAW FROM APPROVING AND SPENDING FEDERAL MONIES ON A PROJECT THAT USES 4(f) PROPERTIES.** This is the mandate of the law as described in Overton Park and this mandate cannot be reconciled with the decision of the Court of Appeals in this proceeding.

The Sixth Circuit's 4(f) analysis in this case stands in clear contrast to the detailed analysis required by Overton Park as evidenced by the numerous decisions by other circuit courts.

In Stop H-3 Association v. Dole, supra., the Ninth Circuit reviewed a highway project that would use two park lands. The court exhaustively reviewed two alternatives, a realignment and the no-build alternative, Id. at 1450-1458. Applying the "stringent" Overton Park standards, the court rejected DOT's claims that the alternatives were infeasible or imprudent. Id. at 1455. The court's eight page analysis reflects the probing, in-depth review of the DOT's 4(f) statement that Overton Park mandates. Of particular note is the court's rejection of DOT's finding that the no-build alternative was imprudent. The court accepted that there was a "need" for the project, but dismissed the agency's claim that the no-build alternative would result in disruptions of such a magnitude that the 4(f) resources should be sacrificed.

In Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole, 770 F.2d

423 (5th Cir. 1985) (involving the widening of a highway in Ft. Worth), the Fifth Circuit reiterated that the court was required to conduct "a thorough, probing, in depth review." Id. at 441, citing Overton Park, 401 U.S. at 415. In that case, the court's focus was on the agency's claim that the project would not use the 4(f) resource. In finding the record in that case inadequate, the court stated:

> While the administrative record supporting the Negative Declaration need not possess the same detail or clarity as an EIS and may, in part, be informal, mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS.

The record in this case, like the record in I-CARE, contains no analysis that supports the conclusion that Alternative 3E and Alternative 4 cannot be built as a matter of sound engineering or that the cost or community disruption of implementing either would reach extraordinary magnitudes. In

comparison to the LAIP they are far less disruptive. The Court of Appeals opinion to the contrary, page 11, Petitioners argued below that both Alternative 3E and the no-build alternative, as well as Alternative 4, were prudent and feasible alternatives on the record before the agency. The Court of Appeals opinion completely omits specific reference to these alternatives.

In Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985), the Eleventh Circuit rejected the FHA's 4(f) analysis of alternatives after it reviewed the record and found that there was no meaningful assessment of the impacts on 4(f) properties associated with each alternative. Id. at 717.

Like that case, the record before this Court does not provide the "predicate facts on which to make a reasonable judgment" in that there is no record evidence that Alternative 3E, Alternative 4 and no-build

alternative will use 4(f) resources.

The recent airport cases also reflect a careful, in depth analysis of effects on 4(f) properties comparing the proposed action with alternatives. In Citizens Against Burlington, Inc. v. Busey, et al., 938 F.2d 190 (D.C. Cir. 1991), Justice Thomas discussed the meaning of the "prudent" requirement in 4(f) analysis, noting that, "second, contrary to the FAA's argument, the case law uniformly holds that an alternative is imprudent under Section 4(f)(1) if it does not meet the transportation needs of a project." Id. at 203. (Emphasis in original). The focus suggested by Justice Thomas on transportation needs as a measure of the prudence of an alternative is lacking in this Court's Opinion. Both Alternative 3E and Alternative 4 increase operational capacity at comparable costs. Both must be determined "prudent".

In Allison v. Department of

Transportation, 908 F.2d 1024 (D.C. Cir. 1990) involving the new Denver airport, the court conducted a probing review of the airport's impact on Barr Lake State Park, a wildlife refuge, and rejected the agency's use of noise guidelines designated to measure the impact on humans in assessing whether the park's "natural attributes" would be significantly impaired by noise from the new airport. Id. at 1028-1029. The court declined to find a "use" because noise from the proposed airport actually decreased when compared to existing airport noise impacts, but its review of the impacts on the natural attributes of the 4(f) resource indicate a proper application of the Overton Park standard of review. More importantly, there the record permitted the court to compare 4(f) impacts.

In contrast, the Court of Appeals in this proceeding failed to assess the impacts of Alternatives 3E and 4 on 4(f) properties

correctly. It appeared to equate all "noise sensitive areas" with 4(f) properties and failed to address the FAA's improper analysis of the noise impact on the Falls of the Ohio Wildlife Refuge using the same guidelines rejected by the D.C. Circuit in Allison. Nowhere in the record does the FAA state that Alternatives 3E and 4 will result in the "use" of 4(f) resources. The Court's conclusion to the contrary is not supported in the record.

The court in Sierra Club v. United States Department of Transportation, 753 F.2d 120 (D.C. Cir. 1985) also conducted the appropriate inquiry into the impact of transportation projects on 4(f) resources in the context of increased noise. The D.C. Circuit assessed the increase in noise within the 4(f) resource (Grand Teton National Park), and found that the increase in noise in the park to be so marginal (1 dB on average) that no "use" occurred. On the

record before it, that Court was able to compare the noise impact on the protected 4(f) resource from the proposed activity to the alternative.

In contrast, the record before the Supreme Court does not permit such comparison because there is no noise analysis of the alternative configurations.

In conclusion, the level of review afforded by the Court of Appeals falls far short of the probing, in depth review of the FAA's conclusions required by Section 4(f) under Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Certiorari should be granted to obtain the proper implementation of Department of Transportation Act Section 4(f) requirements in a manner consistent among the circuits and in conformity with the express requirements of Overton Park.

## II. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT WITHIN THE CIRCUITS.

Petitioners maintain that the Secretary's decision to approve the construction of the LAIP violates Section 4(f) because the Secretary could not have reasonably believed that there were no prudent and feasible alternatives. The EIS contains a description of five alternative configurations, the LAIP (Alternative 5C) and four others. However, only the LAIP and the "no build" alternative are analyzed in the EIS in terms of their effect on the environment.

The Secretary rejected as not feasible or imprudent two alternatives, the no-build alternative and Alternative 3E, primarily for the stated reason that these alternatives would not meet the transportation goals of

the project - increasing airside capacity at SDF.[8]

The Court of Appeals upheld this determination that alternatives which do not fulfill the agency's stated purpose or goal are ipso facto "imprudent" under Section 4(f). Opinion, page 17.

This holding is in conflict with Overton Park as explained in the decision of the Ninth Circuit Court of Appeals in Stop H-3 Association v. Dole, 740 F.2d 1442 (9th Cir. 1984) which requires that the no-build alternative may not automatically be rejected as imprudent simply by claiming that it will not fulfill the transportation goals of the project. In that case the Court of Appeals remanded the decision back to the Secretary to determine whether the no-build alternative was imprudent. The court rejected the Secretary's conclusions that the additional

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[8] See discussion above concerning actual operational data and questionable need for additional capacity at pages 5-8.

cost, increased congestion, or projected commuter delays would cause "unique problems" or result in costs of an "extraordinary magnitude" making the alternative "imprudent" under §4(f). The Ninth Circuit gave no indication that a mere showing of need for the project was sufficient justification for concluding that not to build the project would be imprudent. To equate "need" with prudence weakens the protection which Congress intended to provide 4(f) resources. As this Court recognized in Overton Park, more is required for an alternative to be rejected as imprudent than a showing of need. "It is obvious that in most cases consideration of cost, directness of route, and community disruption will indicate that park land should be used for highway construction whenever possible." Id. at 411-412.

Other circuits taking the opposite position include the Fourth, Fifth, Eighth,

Tenth and Eleventh Circuits. See Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990); Louisiana Environmental Society, Inc. v. Coleman (LES II), 537 F.2d 79 (5th Cir. 1976); Ringsred v. Dole, 828 F.2d 1300 (8th Cir. 1987); Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943 (10th Cir. 1989); Druid Hills Civic Ass'n. v. Federal Highway Admin., 772 F.2d 700 (11th Cir. 1985).

The first case taking the position that a highway project not meeting the "transportation goals" of the project was the old Fifth Circuit's decision in Louisiana Environmental Society, Inc. v. Coleman, supra, involving the construction of a bridge across Cross Lake as part of a circumferential highway project. Without explanation, the court accepted the agency's conclusion that alternatives including the no-build alternative were imprudent "because they failed to fulfill the needed purpose of

a circumferential highway route." 537 F.2d at 85.

Following the Stop H-3 decision, the issue of the Secretary's obligation to consider the prudence of the no-build alternative was next considered by the Eleventh Circuit in Druid Hills Civic Ass'n v. Federal Highway Admin., supra. The Eleventh Circuit noted the conflict between the Stop H-3 decision and the Fifth Circuit's LES II decision but declined to join the Ninth Circuit in recognizing the Secretary's obligation to consider the prudence of no-build, citing the binding precedent of LES II. "Even were we to agree that Stop H-3 offers a view more consistent with Overton Park, we would still be bound by our decision in LES II." 772 F.2d at 716, n. 18.

Other circuits considering the application of the "prudence" test to alternatives that don't expressly meet the transportation goals of a project have simply

concluded without discussion that such alternatives are imprudent per se. Ringsred v. Dole; Lake Hefner. Of the circuits considering the issue, only the Ninth Circuit's Stop H-3 decision can fairly be read as a true attempt to determine whether there is a requirement under Section 4(f) to apply the Overton Park "prudence" test to the no-build alternative or an alternative which does not meet the transportation goals of the agency. The other circuits have simply followed the Druid Hills decision without addressing the issue. Supreme Court guidance is needed to reaffirm this requirement and to bring these other circuits into line with the correct interpretation as announced in Stop H-3.

## III. THE FAA FAILED TO PERFORM ITS PROCEDURAL AND SUBSTANTIVE OBLIGATIONS UNDER NEPA, IN LIGHT OF RECENT SUPREME COURT INTERPRETATION OF THAT LAW.

The past decisions of this Court issued for the purpose of restraint of judicial

activism and in furtherance of the goal of appropriate deference to agency expertise must not be allowed to be misconstrued into a "blank check" approval of anything that the agency offers so long as lip service is given to the required legal conclusions.

The Supreme Court in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S.Ct. 1835 (1989) was asked to review a decision by the Ninth Circuit Court of Appeals that concluded that NEPA imposed a substantive duty on agencies to mitigate adverse environmental effects and a duty to prepare a worst case analysis. The Supreme Court disagreed with the reasoning of the Ninth Circuit, reaffirming the procedural and investigatory nature of NEPA and the courts' reliance on agency deference on matters that are highly technical. The Robertson Court declined to require a worst case analysis where the record reflected agency reliance upon computer projections that were believed

to be appropriately conservative. Having reached these conclusions the Supreme Court restated the fundamental purpose of NEPA:

> "The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's 'action forcing' purpose in two important ways...It ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.
>
> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the dye otherwise casted." Id. at 1845.

The Robertson court recognized that NEPA, when it is properly implemented, serves to provide the public "assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'"

Id. at 1845.

The Robertson court also recognized that, "Implicit in NEPA's demand...is an understanding that the EIS will discuss the extent to which adverse effects can be avoided." Id. at 1846.

In a companion case decided with Robertson, Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851 (1989) the Supreme Court reviewed another decision of the Ninth Circuit Court of Appeals regarding the obligation of an agency to prepare a supplemental EIS. The Supreme Court reversed the Court of Appeals and found that a supplemental EIS was not necessary, clarifying that the standard for review would be whether or not the agency decision to prepare a supplemental EIS was arbitrary and capricious. The Supreme Court again determined that the factual questions presented involved disputed scientific issues, an area within the expertise of the

agency and exercised its discretion not to substitute its judgment for that of the agency.

However, the Marsh opinion does recognize an obligation to prepare supplemental environmental impact statements even though the Court observed that such requirement is not expressly provided within the law. Id. at 1857. The Court cited legal writers to the effect that such supplemental statements may at times be necessary to satisfy the Act's "action-forcing" purpose. The Marsh court cited language closely paralleling the language in the Robertson decision as follows:

> "Rather, NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing government and public attention on the environmental effects of the proposed agency action. 42 U.S.C. Section 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct."

The court cited its earlier decision TVA v. Hill, 437 U.S. 153 (1978) as authority which recognizes that at some point NEPA becomes inapplicable but that up to that point in time, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally 'significant'". The Marsh decision cited with approval the regulations of the Counsel on Environmental Quality at 40 CFR § 1502.9(c) and cited Andrus v. Sierra Club, 442 U.S. 347, 99 S.Ct. 2335 (1979) as imposing a duty on all federal agencies to prepare supplements to either draft or final Environmental Impact Statements if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." The Marsh decision supports both the "rule of reason" concerning the decision of the agency to supplement and the NEPA

requirement that agencies take a "hard look" at the environmental effects of their planned action even after a proposal has received initial approval. Id. at 1859.

The Marsh court applied the Overton Park standard of review restating that the reviewing courts inquiry must be "searching and careful." The court seemed to recognize that an agency decision not to supplement based on the agency interest in finality must trigger a careful review of the record, or judicial review will be rendered meaningless. Id. at 1861.

Some commentators have observed that when NEPA gets to the Supreme Court, the environmentalists always lose.[9] See David C. Shilton "Is the Supreme Court Hostile To NEPA? Some Possible Explanations for a 12-0

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[9] See Philip Michael Ferester, "Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny", The Harvard Environmental Law Review, Volume 16, Number 1, p. 207 (1992).

Record.", 20 Environmental Law 551 (1990). After raising the possibility that the Supreme Court is "hostile" to the Act this writer concludes that such interpretation is not correct. The writer notes that the decisions of Marsh and Robertson, discussed above, as well as the decision of Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766 (1983), Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) and other prior decisions should more accurately be interpreted as reflecting this Court's intention that NEPA accomplish its stated purpose but that its purpose not be expanded from procedural and investigative into substantive obligations, that its focus on actual environmental effects be maintained[10] and that it be interpreted in a manner consistent with the Administrative Procedure

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[10] Rejecting invitations to extend NEPA to appropriation decisions, Andrus, supra, or to psychological health damage, Metropolitan, supra.

Act (APA). Marsh, supra, at 1860 citing APA 5 U.S.C. §706. Nevertheless, this writer's premise raises issues of concern. The 12-0 record of the government before the Supreme Court may tend to self-fulfilling or inadequate agency analysis based on the belief by the agency that it will not be required to provide the factual justification for its conclusions.[11] Based on this risk, it is critical that the Supreme Court look again at this law. In those cases where the Supreme Court has recognized the need for the courts to take a "searching and careful" inquiry into the facts offered in support of

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[11] See Andrew D. Siegel, "The Aftermath of Baltimore Gas & Electric Co. v. NRDC: A Broader Notion of Judicial Deference to Agency Expertise" The Harvard Environmental Law Review, Volume II, Number 2, 1987. This writer predicts that, "If the Federal courts continue to follow Baltimore Gas and defer mechanically to the technical decisions of expert agencies, the agencies will recognize this trend and pattern their decisionmaking accordingly, characterizing important and controversial factual and policy determinations as predictions laden with scientific uncertainty." Id. at page 380.

the agency NEPA conclusions, such discussion occurs as dicta. It is now time for the Supreme Court to provide agency instruction that a "hard look" means exactly that.

Petitioners do not seek substitution of a judicial determination in place of an agency determination of technical questions such as the proper method of noise measurement or the safety of airport configurations. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983).

Petitioners seek a judicial determination whether the underlying facts of record provide adequate support for the agency conclusions. See Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene), 448 U.S. 607 (1980) holding that the OSHA conclusion to lower standard for airborne concentrations of benzene from 10 ppm to 1 ppm was not supported by appropriate findings. See Bowen v. American Hospital Association, 476 U.S.

610 (1986) holding that Health and Human Services regulations regarding health care for handicapped children were not supported with adequate agency rationale and factual basis to withstand hospital challenge. See Motor Vehicle Mfrs. Assn. v. State Farm Mut., 463 U.S. 29 (1983), holding that Secretary of Transportation rescission of passive restraint requirement was arbitrary and capricious where agency failed to provide an adequate basis and explanation for rescinding the requirement.

In the following areas, Petitioners believe that a "searching and careful" inquiry into the factual basis of the FAA decision will require the Supreme Court to conclude that the agency reached a decision that is arbitrary and capricious.

**A. The "Urban Renewal" Sham.**

The FAA analysis of major environmental impacts from the airport expansion is fundamentally skewed in assessing land use,

social, socio-economic, water quality, other cultural resources and solid waste impacts because of the FAA's continued embrace of the "urban renewal" sham depiction of the destruction of the Highland Park and Standiford neighborhoods as resulting from the "no action" alternative. See EIS, Table 1-1. The Court of Appeals rejected Petitioners' argument, reasoning that the FAA had performed an environmental analysis of these land acquisitions and even if the FAA did not perform such analysis, such land acquisitions had independent utility citing Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985 (6th Cir. 1989). The Court of Appeals has misapplied the requirements of NEPA. Doing an environmental analysis (assuming one was done) that the agency mischaracterizes as resulting from "no action" does not help the agency or the public take a "hard look" at the consequences of the proposed action. Such

mischaracterization actually disguises the real effect of the proposed agency action. As such, the essential purpose of NEPA is defeated by such mischaracterization.

The Court of Appeals reliance upon Historic Preservation Guild of Bay View v. Burnley is likewise misplaced. See Footnote 36 in Petitioners' Brief to the Court of Appeals, enumerating repeated descriptions of the "urban renewal" project as part of the proposal to build Alternative 5C, the LAIP. There is no evidence in the record of this action that a land acquisition program of this magnitude would be necessary for any other structural alternative. This record does not support application of the "independent utility" exception of Burnley. The proper question is not whether the project has independent utility but whether it was appropriately labeled part of the no action alternative.

The Court of Appeals declined to

consider the standing issue that could be raised upon withdrawal of the Prestonia, Highland Park and Standiford Neighborhood Associations as Petitioners. Opinion, footnote 1 and footnote 2. However, settlement by these entities does not end the need to complete a proper NEPA analysis of the land use, social, socio-economic and cultural resources that remain today but are likely to be affected by the airport expansion. Through this date, there is ongoing litigation by the businesses Louisville Forge and Gear, Louisville Glove and 42 other entities including the Highland Park Business and Enterprise Association opposing the RAA efforts to condemn their properties. See Petitioners Supplement to Record dated July 30, 1992. Marsh, supra, TVA v. Hill, supra, and Andrus, supra, require remand to the FAA with instructions to supplement the EIS with the destruction of the Highland Park and Standiford

neighborhoods and the elimination of businesses including Louisville Forge and Gear and Louisville Glove properly evaluated as resulting from the LAIP expansion proposal.

**B. Single Event Noise**

Petitioners concede that the measurement of noise impacts is the type of technical evaluation that requires courts defer to agency expertise. Baltimore Gas, supra, Robertson, supra, and Marsh, supra. However, in this case there are two agencies with expertise, the FAA and the Environmental Protection Agency (EPA), and they have disagreed concerning the proper method to evaluate the environmental impacts of noise. The Court of Appeals noted this disagreement which resulted in the Toledo agreement that the FAA would do additional single event noise analysis for certain airports including Louisville. Opinion, page 8. The FAA subsequently added single event noise data in

the final EIS but did no sleep and speech disturbance analysis as requested by EPA and failed to provide an opportunity for public comment on this new data. The FAA failure to reopen for comment resulted in an EPA letter submitted post-EIS expressing its continued dissatisfaction with the FAA conclusions.[12]

Petitioners do not ask the Supreme Court to resolve the disagreement between the FAA and EPA. Petitioners do urge, based on the reasoning in Marsh, supra, and upon proper application of the CEQ regulations,[13] that the FAA treat this single event noise data as new significant information that requires a supplemental EIS.[14]

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[12] See EPA letter January 8, 1991 at Petitioners Court of Appeals Brief Addendum, B-71 to B-78.

[13] 40 CFR §1502.9(c).

[14] Perhaps the best indicator that the FAA abused its discretion by limiting noise impacts on humans to the 65 Ldn was revealed at oral argument when Judge Rosen questioned FAA council concerning single event noise with reference to a sonic boom. She answered, "A sonic boom may be something that

**C. The Alternatives Analysis.**

See the above discussion in Argument I concerning the evidence of record that alternatives exist that would meet the apparent transportation needs at costs equivalent to or less than the cost of the LAIP which do not destroy 4(f) protected resources. 42 U.S.C. §4332(C)(iii). This analysis also reveals a failure to meet the requirements under NEPA that the agency conduct a reasonably complete investigation of the environmental consequences of alternatives.[15]

**D. The Needs Analysis.**

See the discussion above in Statement of Case and in Argument I concerning the evidence of record on the need for an airport

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one person finds terribly intrusive and another doesn't."

[15] Consideration of the environmental impacts of the other structural alternatives and the "no-build" alternative is clearly within the "bounded by some notions of feasibility" requirement. See Vermont Yankee, supra, at page 519.

expansion at Standiford Field at this time. The analysis of need for a project is an important part of both the 4(f) analysis and the NEPA analysis. Therefore the defects complained of above apply with equal weight in this Court's review of the adequacy of the agency's "hard look" at the major environmental impacts from the proposed action and the opportunities to mitigate or avoid such impacts.[16]

**E. Transportation Analysis.**

On page 14, the Court of Appeals approved the EIS discussion of transportation impacts by concluding that it was appropriate for the FAA to treat the Crittenden Drive as closed. In fact, the EIS does not analyze the Crittenden Drive as closed but postpones an analysis of the relocation of that road until a ten year period has elapsed. Only during subsequent briefing did the RAA

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[16] Robertson, supra at 1846. "...EIS will discuss the extent to which adverse effects can be avoided."

suggest that in fact this road may be permanently closed. The impacts of that decision have never been analyzed as required by NEPA.

**CONCLUSION**

Utah Supreme Court Justice Daniel Stewart recently wrote concerning the Bill of Rights after 200 years as providing an effective barrier against a tyranny of the majority. The Supreme Court is the last resort for purposes of implementation of the Bill of Rights in order to provide protection against such tyranny. See Utah Bar Journal (June/July 1991) reprinted in Trial Magazine, October 1991.

Likewise, this Supreme Court is the court of last resort to make government account for its conclusions when it proposes to demolish homes, churches, businesses, neighborhoods, as well as parks and historic resources, or to engage in other activities that appear to propose significant adverse

impacts on those resources, all based on the government's conclusion concerning the "greater good."

If NEPA and 4(f) can help the parties to this dispute to find a less destructive way to meet the real public needs, then the community of Louisville is far better off and the current perception of tyranny by government will be, in part, remedied. Based on the foregoing, Petitioners respectfully petition for writ of certiorari to issue.

Respectfully submitted,

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BY: _____
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Robert E. Reeves
Todd Evan Leatherman

92-231

No. _____

Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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COMMUNITIES, INC.;
DULWORTH & RIVES, INC. PETITIONERS

v.

JAMES B. BUSEY, Administrator,
Federal Aviation Administration;
FEDERAL AVIATION ADMINISTRATION RESPONDENTS

AND

COMMUNITIES, INC. PETITIONER

v.

SAMUEL K. SKINNER, Secretary of the
United States, Department of
Transportation; UNITED STATES
DEPARTMENT OF TRANSPORTATION RESPONDENTS

REGIONAL AIRPORT AUTHORITY OF
LOUISVILLE AND JEFFERSON
COUNTY, KENTUCKY INTERVENOR-RESPONDENTS

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**PETITIONERS' APPENDIX**

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ATTORNEYS FOR PETITIONERS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No: 91-3222/91-5386

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COMMUNITIES, INC.; DULWORTH & RIVES, INC.; PRESTONIA AREA NEIGHBORHOOD ASSOCIATION; HIGHLAND PARK NEIGHBORHOOD ASSOCIATION; STANDIFORD NEIGHBORHOOD ASSOCIATION,

Petitioners,

v. 91-3222

JAMES B. BUSEY, Administrator, Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION,

Respondents,

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY,

Intervening Respondent,

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COMMUNITIES, INC.,

Petitioner,

v. 91-5386

SAMUEL K. SKINNER, Secretary of the United States Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondents,

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY,

Intervening Respondent.

Before: Jones and Nelson, Circuit Judges;
Rosen, District Judge

JUDGMENT

THIS MATTER came before the court upon a petition to review an order of the Federal Aviation Administration and an order of transfer from the United States District Court for the Western District of Kentucky at Louisville.

UPON FULL REVIEW of the records and the briefs and arguments of counsel, we conclude that the Secretary of Transportation's approval, through the Federal Aviation Administration, of the Louisville Airport Improvement Plan should be affirmed, and accordingly:

IT IS ORDERED that the order issued by the agency in this matter be affirmed and the petition to review is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

Issued as Mandate: April 14, 1992

COSTS: (Awarded to respondent)

Filing Fee .....$ None
Printing .....$ 357.50
Total .....$ 357.50

A True Copy.

Attest:

/s/
Deputy Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-3222/5386

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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No. 91-3222

COMMUNITIES, INC.; DULWORTH & RIVES, INC.; PRESTONIA AREA NEIGHBORHOOD ASSOCIATION; HIGHLAND PARK NEIGHBORHOOD ASSOCIATION; STANDIFORD NEIGHBORHOOD ASSOCIATION,

*Petitioners,*

*v.*

JAMES B. BUSEY, Administrator, Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION,

*Respondents,*

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY,

*Intervening Respondent.*

ON PETITION to Review
an Order of the Federal
Aviation Administration

No. 91-5386

COMMUNITIES, INC.,

*Petitioners,*

v.

*SAMUEL K. SKINNER, Secretary of the United States Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION,*

*Respondents,*

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY,

*Intervening Respondent.*

ON ORDER of Transfer
from the United States
District Court for the
Western District of Kentucky

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Decided and Filed February 13, 1992

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Before: JONES and NELSON, Circuit Judges; and ROSEN, District Judge.*

JONES, Circuit Judge. Petitioners, Communities, Inc. and others, seek review of a Federal Aviation Administration ("FAA") order approving the Louisville Airport Improvement Plan ("LAIP"). For the reasons that follow, we deny the petition and affirm the FAA's decision.

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*The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

# I

## A

Standiford Field ("SDF") is centrally located within the city limits of Louisville, Kentucky, in a developed environment, with residential neighborhoods to the north, industrial areas to the south, and various residential and commercial centers or strips to the east and west. Some of the residential neighborhoods, directly under the flight paths of the existing runways, are "historic neighborhoods." To the northeast and west of SDF are a number of such neighborhoods, including Cherokee Triangle, Southern Heights-Beechmont, and Highlands. Another historic neighborhood to the north is Old Louisville, an inner-city neighborhood, bordered by the following: Interstate 65 to the east; railroads, rail yards, and industrial areas to the west and northwest; downtown, commercial Louisville to the north; and the University of Louisville (Belknap

Campus) to the south.

SDF has operated since 1947. In addition to serving nine commercial airlines, SDF has been the national hub for United Parcel Service ("UPS") since 1981. UPS's operations have caused a dramatic growth in both express and air cargo aircraft operations; in four years, express cargo volumes have increased almost fivefold. The Final Environmental Impact Statement ("FEIS") states that, since 1982, there has also been steady growth in the annual number of enplaned passengers and actual departures at SDF, with continued growth forecast. Petitioners maintain, however, that there is in fact no reliable evidence of any increase in passenger traffic, and that the forecasted future growth is based upon unrealistic estimates. Respondents counter that the forecast for passenger-traffic growth reflects national growth patterns and recognizes the steady continuing growth of

cargo services. At oral argument, however, respondent Regional Airport Authority ("RAA") of Louisville and Jefferson County, Kentucky conceded that, "This is a cargo project."

The LAIP proposed adopting the recommendation of a study conducted by the RAA through its contractor, Schimpeler-Corradino Associates, which calls for two independent, parallel runways to be constructed on the current site of SDF. To accommodate the new runways, the airport boundaries must be expanded. This involves the acquisition or relocation of a number of commercial and industrial sites and other businesses. Three residential neighborhoods adjacent to the airfield's boundaries (Prestonia, Standiford, and Highland Park) are being cleared and developed for uses compatible with the airport. Only a portion of the acreage acquired in the land acquisition program will be used for the airport itself. As of the date of the FAA's

order, 69% of all residential structures had been purchased. In addition, the project contemplates the temporary closure and permanent realignment of a portion of Crittenden Drive.

As a result of the new runways, SDF will be able to accommodate UPS's nighttime operational needs. The project will also increase the airport's maximum capacity by 67%.

On June 22, 1988, the RAA approved the plan to construct the two independent runways and called for the immediate commencement of an environmental assessment to meet the requirements of federal law, including Department of Transportation Act, § 4(f), 49 U.S.C. § 303 (1988). Based on this information and national and regional needs, the respondent Secretary of the Department of Transportation ("DOT"), acting through the FAA, formally approved federal funding for the LAIP in the January 7, 1991 Record of

Decision ("ROD"). The decision stated that the LAIP complied with, inter alia, § 4(f).

Petitioners consist of the following organizations with interests in the communities located near the airport: Communities, Inc., which is an umbrella organization representing Beechmont Neighborhood Association, Inc., Cloverleaf Neighborhood Association, Inc., Okolona Community Council, Old Louisville Neighborhood Association, St. Joseph Neighborhood Association, and the municipalities of Minor Lane Heights and South Park View; Dulworth & Rives, Inc., which is a real estate development firm in Louisville, Kentucky that owns several investment properties to the south of SDF; and Prestonia Area Neighborhood Association, Highland Park Neighborhood Association, and Standiford Neighborhood Association, which are independent neighborhood associations representing residents in the three

neighborhoods slated for demolition due, in part, to the LAIP.[1] On March 7, 1991, petitioners filed a timely petition for review by this Court of the FAA's order of January 7, 1991, granting federal approval for the LAIP. On March 25, 1991, pursuant to 28 U.S.C. § 1631 (1988), the United States District Court for the Western District of Kentucky transferred to this Court a complaint also challenging the January 7, 1991 order, filed by petitioners on March 6, 1991. Pursuant to 49 U.S.C. app. § 1486(a) (1988), this Court has exclusive jurisdiction over both the claims presented in that complaint and the claims in the petition for review.

Petitioners assert that the Environmental Impact Statement ("EIS") prepared by the FAA for this project violates

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[1]The neighborhood associations of Prestonia, Highland Park, and Standiford withdrew from this appeal as a result of the settlement described in Part I.B of this opinion.

the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. §§ 4321-4370c (West 1977 & Supp 1991); that the FAA also violated National Historic Preservation Act ("NHPA"), § 106, 16 U.S.C. § 470f (1988), by failing to consult adequately with the Advisory Council on Historic Preservation; and that the FAA violated both § 4(f) and a similar provision in the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 2208(b)(5) (1988), because this project will result in the constructive "use" of properties protected by that statute and more could be done to minimize adverse impacts. They contend that the FEIS analysis omitted a number of cumulative impacts associated with the project, including the impact of the LAIP on numerous hazardous waste sites and the resulting remediation of hazardous wastes on those sites, and the impact from the deferred relocation of a major thoroughfare (Crittenden Drive). Additionally,

petitioners contend that the FEIS fails to evaluate all reasonable alternatives and their environmental consequences, particularly the noise impacts of those alternatives and the impact on historic and park resources protected by § 4(f).

The FAA states through the FEIS, however, that implementation of the LAIP will substantially reduce overall noise exposure in the Louisville community. The FAA plans to accomplish this by, inter alia, directing traffic, whenever possible, over the industrial areas south of the airport between 10:00 p.m. and 7:00 a.m. ("contraflow" operations). Furthermore, UPS has agreed to operate only quieter, "Stage III" aircraft in Louisville by 1995, if the LAIP is fully implemented. Nonetheless, the FAA concedes that noise exposure will shift, causing noise levels to increase in certain areas, such as Old Louisville.

B

In addition to the petition for review filed in this Court and the complaint filed in district court that was transferred to this Court, petitioners also instituted various other, indirect challenges to the airport expansion plan. Those proceedings evolved from a decision of the City of Louisville on June 22, 1988 to begin using the city's urban renewal powers to acquire the neighborhoods of Prestonia, Standiford, and Highland Park in order to create a commercial zone around the airport. This decision was announced simultaneously with the LAIP and was collectively called "The Airport Expansion Project."

To implement the urban renewal program, the city passed ordinances declaring each of the three neighborhoods to be "blighted" and subject to the city's condemnation powers. On October 18, 1990, the Kentucky Supreme Court held that the city's finding of blight

was not supported by substantial evidence and was "such an abuse of discretion as to be arbitrary" in violation of Section 2 of the Kentucky Constitution. *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 712 (Ky. 1990).

The city continued with the project, taking the position that the acquisition of the three neighborhoods is still valid as a land-use program pursuant to the Kentucky statutes that authorize airport authorities to condemn land for airport activities. The neighborhoods then brought actions, which were pending at the time of this appeal, in the United States District Court for the Western District of Kentucky to obtain injunctive relief against the RAA to preclude the RAA's further acquisition of properties under threat of condemnation by the City of Louisville. They argued that the court should also declare the prior acquisitions void and prohibit demolition of vacated

houses. Their suit was based upon the principle of Kentucky law that forbids condemnation of land owned by one private individual for transfer to another private entity, including airport-supported commercial enterprises. At oral argument, counsel for petitioners represented that the neighborhoods of Prestonia, Standiford, and Highland Park and the RAA had reached a settlement, resulting in the withdrawal of the three neighborhoods as parties to this petition.

II

Petitioners' main contention is that the FAA's decision failed to assess whether the protected § 4(f) resources located outside the projected 65 Day-Night Level (Ldn) noise contour would be "used" by the LAIP. Ldn is calculated by adding up all the sound exposure during daytime (7:00 a.m. - 10:00 p.m.) plus 10 times the sound exposure occurring during the nighttime and averaging

this total sum by the number of seconds during a 24-hour day. Points of equal exposure are then connected by contour lines.

Petitioners explain that, as a result of a dispute with the Environmental Protection Agency ("EPA") regarding the noise analysis conducted at the Toledo airport, the FAA agreed to engage in a comprehensive reevaluation of the appropriateness of using 65 Ldn as the sole indicator of adverse environmental effects from noise. While this reevaluation is in process, the FAA agreed to include a supplemental single event noise ("SEL," derived from peak Sound Exposure Level) analysis in subsequent projects. After being reminded of its commitment, the FAA performed such an analysis in this case. Petitioners contend that the analysis was inadequate, but that it still revealed significant noise problems for areas outside the 65 Ldn contour.

The FAA contends that, because there is

no reliable correlation between SEL data and human response, the FAA properly declined to measure its statutory obligations under NEPA, NHPA, or § 4(f) by reference to SEL information. The 65 Ldn standard was established in response to Congress's direction that the FAA produce a reliable methodology for measuring noise and human response. *See, e.g.*, Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. app. § 2102 (1988).

In general, agency decisions are set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1988). In particular, judicial review of NEPA compliance is limited in scope. "The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore*

*Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983).

Agency decisions under the Transportation Act are reviewed under the same arbitrary and capricious standard. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In cases involving § 4(f), however, the court must additionally find "that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems." *Id.*

There is no judicial support for petitioner's argument that the FAA was required to go beyond the Ldn cumulative noise impact methodology or use some standard other than 65 Ldn for its determinations under any of the statutes. In *Sierra Club v. United States Dep't of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985), the District of Columbia Circuit rejected a challenge to

FAA's use of the Ldn noise methodology:

> Petitioner contends that the use of cumulative noise level analysis rather than individual event noise level analysis is unacceptable. The FAA adopted cumulative noise level analysis to satisfy the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. § 2102 (1982), which calls for establishment of a uniform test for all airport compatibility plans. It is clearly within the expertise and discretion of the agency to determine proper testing methods. We find no abuse of discretion in the choice of the cumulative noise level analysis methodology . . . .
>
> . . . The fact that the agency in exercising its expertise relied on the cumulative impact levels as being more indicative of the actual environmental disturbance is well within the area of discretion given to the agency.

(Citations omitted); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) (the agency's choice of scientific method to measure noise was "obviously not capricious"), *cert. denied*, 60 U.S.L.W. 3173 (U.S. Dec. 2, 1991) (No. 91-397); *Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 469 (1st

Cir. 1989) (holding that choice of cumulative noise data over single event noise data -- while not "immune from criticism or legal attack" -- was not unreasonable under the circumstances); *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569, 1573 (11th Cir. 1988) (FAA has discretion to determine proper testing methods); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 197 (7th Cir.) (same), *cert. denied*, 479 U.S. 847 (1986).

Furthermore, we agree with the District of Columbia Circuit that "[t]he EPA's criticisms of the FAA, and the agencies' subsequent deal, do not change our view of the FAA's findings." *Citizens Against Burlington*, 938 F.2d at 201. This is particularly true in the instant case, because the FAA collected and analyzed SEL data. *See* J.A. at 3653. Petitioners apparently want this court not only to tell the FAA that SEL is superior to Ldn, but also to tell the FAA how the SEL data should

affect its analysis. If this court were to grant petitioners' request, it would be traveling far outside both its constitutional role and its expertise. On the record presented, there is no basis for holding that the FAA's noise analysis was an abuse of discretion.

Our approval of the FAA's noise methodology necessarily entails finding that the LAIP did not use § 4(f) resources outside the 65 Ldn contour. Even if this court were to consider the SEL data, however, petitioners have failed to demonstrate how mere noise may "use" the primary § 4(f) resources involved in this case. The property in Old Louisville qualified for listing on the National Register because of its architectural importance and historical significance. It was not arbitrary or capricious for the FAA to determine that an increase in noise levels would not affect the relevant characteristics of Old Louisville --

its architecture and its place in history -- particularly given that Old Louisville falls outside the 65 Ldn contour used as a standard measure of adverse noise impacts on residential property. Although courts have recognized that noise alone may "use" a park, *see, e.g., Citizens Against Burlington*, 938 F.2d at 202-03, and that noise combined with air pollution and elimination of view, resulting from the close location of a proposed highway, may use historic property, *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803, 812 (11th Cir. 1988), the rationale of those cases does not provide support for petitioners here.

Furthermore, petitioners have failed to propose an alternative that would not use § 4(f) resources. Other circuits have held that an alternative route that causes substantially equal damage to § 4(f) property is not a cognizable alternative within the meaning of § 4(f). *Coalition on Sensible*

*Transp. ("COST"), Inc. v. Dole*, 826 F.2d 60, 65 (D.C. Cir. 1987); *Druid Hill Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700, 715 (11th Cir. 1985). In *COST*, the appellant argued that there was no support in the record for the Secretary's determination that it was prudent to impact one historic site as opposed to another. The court rejected this argument, however, stating that "formal findings are not required in a § 4(f) determination." 826 F.2d at 66. We agree with the District of Columbia Circuit that the burden of suggesting a cognizable alternative is properly placed on petitioners.

At oral argument, petitioners suggested "alternative 4," which involves expansion of SDF over an uninhabited landfill to the south. In the FEIS, the FAA summarized alternative 4 as follows:

> This alternative calls for installation of an east-west parallel runway south of Standiford Field and parallel to the

> existing east-west runway (11/29). The distance between the two runways would exceed 4,300 feet, allowing fully independent, simultaneous operations during both good and bad weather based on FAA rules. However, it would require closing the landfill in the area of Outer Loop and I-65 operated by Waste Management of Kentucky, Inc. Major portions of the landfill would have to be stabilized and/or removed. Several businesses would be displaced to accommodate the western end of the runway and taxiway connection to the existing airport. The runway and taxiway facility would be built to accommodate the function of Slop Ditch, a major drainage channel splitting the existing landfill site. It is possible that the interchange of Outer Loop with I-65 would constitute an obstruction within the required clear zone, requiring elevation of the east end of the runway on fill material.

J.A. at 3615. In light of the foregoing evidence, the FAA concluded that alternative 4 was "extremely inefficient" and, of particular importance here, would "[r]esult in almost all flights passing over noise-sensitive areas immediately east and west of the airfield." J.A. at 3618. Thus, petitioners fall far short of suggesting a

feasible alternative that would not also use § 4(f) resources. Lacking a feasible alternative under § 4(f)(1), the FAA is entitled to proceed, as long as it undertakes measures to mitigate the impact on § 4(f) resources under § 4(f)(2). *See* 49 U.S.C. § 303(c)(1), (2) (1988).

Finally, our approval of the FAA's noise methodology also means that the FAA is required neither to reopen public comment following publication of SEL data nor prepare a supplemental EIS analyzing the impact of increased single event noise. Even if we were to consider the SEL data, however, the agency's determination of whether new information requires the preparation of a supplemental EIS is also subject to review under the arbitrary and capricious standard. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76 (1989). Given that the FAA did in fact discuss the SEL data and determined that the information did not alter

its conclusions regarding the noise impacts of the LAIP, we do not find that the agency in any way abused its discretion.

III

Petitioners contend also that the FAA violated the NEPA by "segmenting" the analysis of hazardous wastes and transportation. Petitioners' criticism of the FAA's analysis of the hazardous substances impacts of the LAIP hinges on the perceived lack of a complete remediation or mitigation plan. In so arguing, petitioners run afoul of the Supreme Court's directive in *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1935 (1989).

In *Robertson*, the Supreme Court unanimously reversed the Ninth Circuit's holding that NEPA required a complete mitigation plan to be developed and included in an environmental impact statement. The Court stated that

> it would be inconsistent with NEPA's reliance on procedural

> mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.
>
> We thus conclude that the Court of Appeals erred, first, in assuming that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions,'" and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action."

*Id.* at 1847 (citations omitted).

The FAA's discussion in the FEIS of remediation is precisely the type of analysis explicitly approved of in *Robertson* -- identification and discussion of various potential measures to mitigate the environmental impact of the LAIP. As the ROD concludes, "sufficient investigation has been accomplished to identify the type of contaminants, a reasonable estimate of the extent of contamination, alternatives for remedial actions, and a reasonable estimate

of the cost to remediate." J.A. at 3878. FAA's investigation regarding the hazardous substances impacts of the LAIP meets the "hard look" standard. *See Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 264-65 (6th Cir. 1977) (NEPA hard look requirement is tempered by a practical rule of reason; impact statement need not document every particle of knowledge an agency might compile in assessing a project); *National Resources Defense Council, Inc. v. Tennessee Valley Auth.*, 502 F.2d 852, 853-54 (6th Cir. 1974) (same).

As for the "transportation impact" -- that is, the closing of Crittenden Drive -- the FEIS and ROD make it clear that the drive will be closed. Reconstruction, if it takes place at all, will not take place for at least ten years, and plans for reconstruction have not yet been determined. Under the principles in *Robertson*, the FAA may properly delay consideration of the environmental

impacts of this speculative project and, instead, treat the drive as closed. *See* J.A. at 1925-38 (discussing the impact of closing Crittenden Drive).

IV

Petitioners contend also that the FAA violated the NEPA by failing to consider and analyze the impact of the proposed acquisition and destruction of the Standiford, Prestonia, and Highland Park neighborhoods as part of the proposed action alternative. They allege that the draft FEIS described the demolition of 1,300 units in the three neighborhoods adjacent to the airport as urban renewal action that would occur without regard to the airport expansion and, therefore, evaluated the destruction of these residential areas as part of the no-action alternative. Upon the decision of the Kentucky Supreme Court that such acquisition was undertaken in an unconstitutional manner, petitioners contend that the FAA was required

to reopen the public hearing process and receive comment on the impact this decision has on the analysis of the consequences of the airport expansion.

With or without the expansion of SDF, the governments of Louisville and Jefferson County have been and remain committed to removing certain residential properties from the three neighborhoods near SDF that are currently heavily impacted by aircraft noise. They have demonstrated that commitment by moving ahead with a land acquisition program -- using strictly local money -- long before there was any assurance that the airport project would, or could, be built. That program was already 69% complete in January 1991. It is fully discussed in the FEIS, just as the *Prestonia* decision is fully discussed in the ROD.

Petitioners essentially advance another "segmentation" argument, contending that the FAA characterized the land acquisition as a

separate project in order to avoid performing the requisite environmental analysis. Petitioners cannot succeed with a segmentation argument, however, because (1) the FAA performed the environmental analysis, and (2) even in the absence of any environmental analysis, the local land-acquisition program has independent utility within the meaning of *Historic Preservation Guild v. Burnley*, 896 F.2d 985, 990-92 (6th Cir. 1989).[2]

V

Petitioners contend also that the FAA violated the NEPA by failing to consider the alternatives. For an agency to conclude that there is no "feasible" alternative, "the Secretary must find as a matter of sound

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[2]Because of our disposition of this issue, we offer no opinion as to what effect, if any, the withdrawal of the Prestonia, Highland Park, and Standiford neighborhood associations as parties to the instant petition has upon the standing of the remaining neighborhoods to contest this issue.

engineering it would not be feasible to build the [project] along any other route." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971). Feasible alternatives may nonetheless be rejected if they present "unique problems" or cause extraordinary costs and community disruption. *Id.* at 413.

The two alternatives ultimately considered in the FEIS -- the LAIP and the no action alternative -- were arrived at from about two dozen initially considered. Working Paper No. 1, "Airport Improvement Alternatives," presented discussions of alternative facility improvements that had a reasonable expectation of implementation, grouped in five categories of operation. Five potential airport configurations were then selected for detailed evaluation and their costs and effects were presented in Schimpeler-Corradino Technical Report No. 2, "Evaluation of Alternatives," and No. 3,

"Selection of Preferred Alternative." These five are depicted in the FEIS. They include the two configurations that petitioners urge would be more appropriate -- that is, the only two variations that would avoid taking the historic properties of James Lowell Elementary School, Grove Park and Highland Park Community Center, and the residence at 2111 South Park Road. A thorough discussion of the alternatives is presented in the FEIS, and for each, the FEIS includes a graphic configuration, an engineering analysis, and an explanation of why the alternative was either imprudent or infeasible. In addition to the FEIS discussion of these alternatives, the administrative record is replete with extensive documentation of a very detailed evaluation. The FAA selected the fifth alternative as the only practical and feasible alternative.

The reasons for deeming the other alternatives infeasible were fully explained.

The FAA reasonably rejected several of the alternatives that presented severe engineering requirements. Other alternatives were found to be imprudent for reasons including their high cost, safety hazards, operational difficulties, and disruptions to landfills and noise-sensitive areas. In short, each was rejected because it presented unique problems and would not accomplish the goal of increasing capacity at SDF. By focusing on the ROD and FEIS, which represent only the final stage in the lengthy review process, petitioners ignore the enormous record evidence on feasibility.

**VI**

For the foregoing reasons, the Secretary of Transportation's approval, through the Federal Aviation Administration, of the Louisville Airport Improvement Plan is **AFFIRMED,** and accordingly, the petition for review is **DENIED.**

Nos. 91-3222/91-5386

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMUNITIES, INC.; DULWORTH & RIVES, INC.,

Petitioners,

v.

JAMES B. BUSEY, ETC., ET AL (91-3222),
SAMUEL K. SKINNER, ETC., ET AL. (91-5386),

Respondents,

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY (91-5386),

Intervenor,

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NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL.,

Amici Curiae.

**O R D E R**

**BEFORE:** JONES and NELSON, Circuit Judges; and ROSEN,*** United States District Judge.

The court having received a petition for rehearing en banc, and the petition having

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***Hon. Gerald E. Rosen sitting by designation from the Eastern District of Michigan

been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/S/
**Leonard Green, Clerk**

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The National Environmental Policy Act of 1969, Section 102, 42 U.S.C. §4332 provides in relevant part:

> "§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts
>
> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 U.S.C. §§4321 et seq.], and (2) all agencies of the Federal Government shall ---
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on ---
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the

local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through agency review processes;..."

Title 49 U.S.C. §303 provides in relevant part:

"§303. Policy on lands, wildlife and waterfowl refuges, and historic sites.

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and

effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use (other than any project for a park road or parkway under section 204 of title 23) of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State or local officials having jurisdiction over the park, area, refuge, or site) only if --

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use."

The Airport and Airway Improvement Act,

§2208. Submission and approval of project grant application.
(b) Approval. (1) No project grant application may be approved by the Secretary unless the Secretary is satisfied that --

(5) It is declared to be national policy that airport development projects authorized pursuant to this title shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency with regard to any project included in a project grant application involving airport location, a major runway extension, or runway location which may have a significant impact on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have significant adverse effect unless the Secretary shall render a finding, in writing, following a full and complet· review, which shall be a matter of public record, that no feasible and prudent

> matter of public record, that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect."

United States Department of Transportation, Federal Aviation Administration, Order 5050.4A Airport Environmental Handbook ¶ 83 (Oct. 8, 1985) provides in relevant part:

> "b. Both section 509(b)(5) of the 1982 Airport Act and section 4(f) of the DOT Act require a finding that "no feasible and prudent alternative" exists. The terms "feasible" and "prudent" are separate criteria and refer to sound engineering principles and sound judgment, respectively. A construction alternative, for example, may be feasible if, as a matter of sound engineering principles, it can be built. It may not be prudent, however, because of safety, policy, environmental, social, or economic consequences. The environmental documentation must show that no feasible and prudent alternative exists when all factors (safety, national policy, efficiency, economic, social, and environmental) are considered."

United States Department of

Administration, Order 5200.5 FAA Guidance Concerning Sanitary Landfills On or Near Airports ¶¶ 3, 5 (Oct. 16, 1974) provides in relevant part:

> "Various studies and observations have resulted in the conclusion that sanitary landfills are artificial attractants to birds. Accordingly, landfilIs located in the vicinity of an airport may be incompatible with safe flight operations. Those conditions that are not compatible must be eliminated, to the extent practicable.
>
> * * *
>
> Sanitary landfills will be considered as an incompatible use if located within areas established for the airport through the application of the following criteria:
>
> a. Landfills located within 10,000 feet of any runway used or planned to be used by turbojet aircraft.
>
> * * *
>
> d. Any landfill located such that it places the runways and/or approach and departure patterns of an airport between bird feeding, water or roosting areas.

TABLE 4

HISTORIC AIR CARGO GROWTH AT STANDIFORD FIELD

| Year | Total Express (lbs.) (000) | Cargo Aircraft Operations |
|---|---|---|
| 1981 | 2,481 | n.a. |
| 1982 | 66,318 | 2,376 |
| 1983 | 276,789 | 12,824 |
| 1984 | 463,393 | 29,652 |
| 1985 | 816,923 | 36,260 |
| 1986 | 987,466 | 33,878 |
| 1987 | 1,053,611 | 31,400 |

Source: Regional Airport Authority of Louisville and Jefferson County

6

### 2.3.2.3 Airport Use and Activity

The local and regional need for the project most recently was defined by the RAA in *Evaluation of Airport Facility Needs at Standiford Field*, June, 1988.[6] RAA studies found that airfield capacity will be exceeded in some afternoon and early morning hours by 1992, as shown in Table 2-4. As discussed above, the need for the LAIP, and its parallel runways, principally is a function of airfield operations constraints. The growing air freight operations of UPS require expanded airfield capacity. UPS is very competitive in the Next Day Air service category. The nature of Next Day Air service and the "hub" operation of UPS focuses its landings

Table 2-3

AIR CARGO GROWTH AT STANDIFORD FIELD

| Fiscal Year | Total Express (1'000's of lbs.) | Cargo Operations |
|---|---|---|
| 1981 | 2,481 | N.A. |
| 1982 | 66,318 | 2,376 |
| 1983 | 276,789 | 12,824 |
| 1984 | 463,393 | 29,652 |
| 1985 | 816,923 | 36,260 |
| 1986 | 987,466 | 33,878 |
| 1987 | 1,022,297 | 37,450* |
| 1988 | 1,455,596 | 41,700* |

*Estimated

Source: Regional Airport Authority of Louisville and Jefferson County.

[6] Final Report, Evaluation of Airport Facility Needs at Standiford Field, Regional Airport Authority of Louisville and Jefferson County, June, 1988.

# DATA BANK

## BUSINESS

| AREA | | | |
|---|---|---|---|
| • TELEPHONE CONNECTIONS (Feb.) | 7,645 | 10,516 | 7,309 |
| • TELEPHONE DISCONNECTIONS (Feb.) | 5,822 | 8,931 | 6,055 |
| • TOTAL TELECOMMUNICATIONS LINES (Feb.) | 386,253 | 383,434 | 374,789 |
| • LBS. OF AIR FREIGHT (Feb.) | 474,144 | 532,533 | 477,755 |
| • LBS. OF AIR MAIL (Feb.) | | | 2.06M |
| • LBS. OF EXPRESS PACKAGES (Feb.) | 131.25M | 133.99M | 127.06M |
| • NET CORP. PROFITS TAX (Year ending March 31) | $40.3M | $40.1M | $37.3M |
| • WITHHOLDING TAXES (Year ending March 31) | $156.7M | $154.6M | $147.7M |
| **KENTUCKY** | | | |
| • SCBELL PHONE CONNECTIONS (Feb.) | 18,096 | 22,426 | 17,424 |
| • SCBELL PHONE DISCONNECTIONS (Feb.) | 14,370 | 16,643 | 14,748 |
| • SCB TOTAL TELECOMM. LINES (Feb.) | 952,504 | 948,835 | 929,800 |
| • NEW DOMESTIC CORPORATIONS (Feb.) | 605 | 717 | 651 |
| • NEW OUT-OF-STATE CORPORATIONS (Feb.) | 132 | 134 | 140 |
| • GENERAL FUND RECEIPTS (Feb.) | $357.9M | $406.2M | $292.2M |
| **NATIONAL** | | | |
| • HEAVY TRUCK SALES (Feb.) | 7,188 | 8,563 | 6,834 |
| • MEDIUM TRUCK SALES (Feb.) | 9,886 | 8,499 | 12,519 |
| • LIGHT TRUCK SALES (Feb.) | 252,331 | 231,118 | 295,877 |
| • MAJOR APPLIANCE SHIPMENTS (Feb.) | 3.14M | 3.55M | 3.75M |
| • GALLONS OF DISTILLED SPIRITS (Aug.) | 29.4M | 29.8M | 29.9M |
| • CIGARETTES, PACKAGES TAXED (Nov.) | 2.14B | 2.20B | 2.17B |
| • TOTAL LBS. ALUMINUM SHIPPED (Dec.) | 1.19B | 1.18B | 1.12B |

## SALES

| | Current period | Previous period | Year ago |
|---|---|---|---|
| • KY. SALES AND USE TAX (Feb.) | $80.0M | $135.7M | $67.4M |
| • KY. MOTOR VEHICLE USE TAX (Feb.) | $14.5M | $20.0M | $14.5M |
| • JEFF. CO. NEW CAR REGIS. (March) | 1,887 | 1,414 | 1,778 |
| • JEFF. CO. NEW TRUCK REGIS. (March) | 368 | 288 | 494 |

## TRAVEL

| | Current period | Previous period | Year ago |
|---|---|---|---|
| **STANDIFORD FIELD** | | | |
| • DAILY PLANE DEPARTURES (March) | 86 | 84 | 85 |
| • TOTAL AIR PASSENGERS (Feb.) | 139,847 | 151,306 | 142,589 |
| • TOTAL AIRCRAFT OPERATIONS (Feb.) | 13,113 | 14,052 | 13,059 |
| • TOTAL BOWMAN OPERATIONS (Feb.) | 8,607 | 7,362 | 11,696 |
| **TOURISM** (Feb.) | | | |
| • KY. TRAVEL BAROMETER (change from year ago) | +2.2% | -6.0% | +1.9% |
| • STATE MOTOR FUELS TAX RECEIPTS (Feb.) | $24.6M | $28.1M | $22.6M |

T = thousands M = millions B = billions NA = not available

To obtain a list of the sources of information contained in Data Bank, write to Business File, 525 W. Broadway, Louisville, Ky. 40202.

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| | | | |
|---|---|---|---|
| • LOUISVILLE (May) | 0 | 0 | 0 |
| • JEFFERSON COUNTY (May) | 8 | 4 | 44 |
| **COMMERCIAL PERMITS** (value) | | | |
| • LOUISVILLE (May) | $1.18M | $1.20M | $3.97M |
| • JEFFERSON COUNTY (May) | $2.58M | $476.0T | $885.0T |
| **STATE CONSTRUCTION CONTRACTS** (value) | | | |
| • NON-RESIDENTIAL (May) | $167.27M | $77.88M | $144.03M |
| • RESIDENTIAL (May) | $147.51M | $171.39M | $138.26M |

## BUSINESS

| | Current period | Previous period | Year ago |
|---|---|---|---|
| **AREA** | | | |
| • TELEPHONE CONNECTIONS (May) | 7,874 | 9,922 | 8,751 |
| • TELEPHONE DISCONNECTIONS (May) | 7,469 | 7,665 | 8,241 |
| • TOTAL TELECOMMUNICATIONS LINES (May) | 397,590 | 397,210 | 388,861 |
| • LBS. OF AIR FREIGHT (May) | 533,367 | 584,645 | 569,897 |
| • LBS. OF AIR MAIL (May) | 2.55M | 2.65M | 2.23M |
| • LBS. OF EXPRESS PACKAGES (May) | 136.61M | 136.20M | 133.78M |
| • NET CORP. PROFITS TAX (Year ending March 31) | $36.0M | $36.0M | $40.3M |
| • WITHHOLDING TAXES (Year ending March 31) | $163.2M | $160.4M | $156.7M |
| **KENTUCKY** | | | |
| • SCBELL PHONE CONNECTIONS (May) | 19,561 | 22,258 | 21,789 |
| • SCBELL PHONE DISCONNECTIONS (May) | 18,746 | 18,162 | 20,438 |
| • SCB TOTAL TELECOMM. LINES (May) | 987,096 | 986,289 | 961,150 |
| • NEW DOMESTIC CORPORATIONS (May) | 618 | 699 | 652 |
| • NEW OUT-OF-STATE CORPORATIONS (May) | 142 | 154 | 146 |
| • GENERAL FUND RECEIPTS (May) | $335.8M | $446.2M | $332.8M |
| **NATIONAL** | | | |
| • HEAVY TRUCK SALES (May) | 9,600 | 10,864 | 8,250 |
| • MEDIUM TRUCK SALES (May) | 10,160 | 12,086 | 10,754 |
| • LIGHT TRUCK SALES (May) | 383,758 | 373,906 | 337,985 |
| • MAJOR APPLIANCE SHIPMENTS (May) | 4.06M | 4.05M | 3.91M |
| • GALLONS OF DISTILLED SPIRITS (Oct.) | 30.7M | 26.8M | 31.1M |
| • CIGARETTES, PACKAGES TAXED (Feb.) | 1.71B | 1.84B | 1.71B |
| • TOTAL LBS. ALUMINUM SHIPPED (March) | 1.16B | 1.05B | 1.10B |

## SALES

| | Current period | Previous period | Year ago |
|---|---|---|---|
| • KY. SALES AND USE TAX (May) | $113.7M | $112.6M | $114.1M |
| • KY. MOTOR VEHICLE USE TAX (May) | $18.6M | $17.7M | $17.8M |
| • JEFF. CO. NEW CAR REGIS. (May) | 2,053 | 2,575 | 2,133 |
| • JEFF. CO. NEW TRUCK REGIS. (May) | 316 | 318 | 289 |

## TRAVEL

| | Current period | Previous period | Year ago |
|---|---|---|---|
| **STANDIFORD FIELD** | | | |
| • DAILY PLANE DEPARTURES (June) | 73 | 75 | 86 |
| • TOTAL AIR PASSENGERS (May) | 177,389 | 155,840 | 176,670 |
| • TOTAL AIRCRAFT OPERATIONS (May) | 13,223 | 13,043 | 13,958 |
| • TOTAL BOWMAN OPERATIONS (May) | 11,730 | 12,375 | 12,150 |
| **TOURISM** (April) | | | |
| • KY. TRAVEL BAROMETER (change from year ago) | +1.8% | +1.7% | +0.1% |
| • STATE MOTOR FUELS TAX RECEIPTS (May) | $30.2M | $28.4M | $30.3M |

T = thousands M = millions B = billions NA = not available

To obtain a list of the sources of information contained in Data Bank, write to Business File, 525 W. Broadway, Louisville, Ky. 40202.

**NTT reported a second straight year of falling profits in the fiscal** year ended March 31 — down 19 percent to 190.9 billion yen, or $1.5 billion.

Kojima, 62, has won some victories in his unenviable task of turning those trends around. Two years after he vowed to get the government to lift a ban on foreign ownership of stock in the former telecommunications monopoly he got what he wanted.

The government is expected to set a date soon for allowing foreign investors to buy up to 20 percent of NTT's 15.6 million shares outstanding — having decided foreign ownership is less a threat to the national interest than a lack of any buyers at all.

Market analysts in Tokyo, however, say they don't expect foreigners to rush in and buy.

"They think that if the Japanese people won't buy it maybe foreigners will?" said Kathy Matsui, market strategist for Barclays de Zoete Wedd in Tokyo. "We aren't getting any requests for reports on NTT

## BANKRUPTCY PROCEEDINGS

A partial list of bankruptcy proceedings filed in Kentucky in June. Included are the name, location and the chapter of federal bankruptcy code under which the petition was filed. (Chapter 7 — court-appointed trustee sells assets and debtor is discharged of debts. Chapter 11 — company or individual seeks to reorganize and is protected from creditors while continuing to operate. Chapter 12 — farmer seeks to reorganize and is protected from creditors while continuing to operate. Chapter 13 — debtor with income pays debts over time under court supervision.)

- **Marty Eugene** and **Jennifer Sue Minton,** fdba Minton Brothers Garage, Livermore, Chapter 7.
- **Jesse Radford Hurt,** fdba Marrowbone Country Store, Marrowbone; Chapter 7.
- **Vanda P. Ethier,** aka Vanda R. Chambers, fdba Vanda's Dixie House Restaurant, Elizabethtown; Chapter 7.
- **Samuel E. B.** and **Kimberly L. Jaquay,** aka Kim's Cleaning Service, Bowling Green; Chapter 7.
- **Kenneth L.** and **Marsha F. Hawkins,** fdba Current Electric, Electrical Contractors, Mid-State Electric, Madisonville; Chapter 7.
- **Orville Nunn,** dba Orville Dunn & Sons Sanitation Service, Bonnieville; Chapter 13.
- **William H. Jr.** and **Wanda A. Page,** akd Wanda Shircliff, Wanda Glasscock, dba Page Sign Co., Crestwood; Chapter 13.

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TABLE 8

CHARACTERISTICS OF RESIDENTIAL AREAS PROPOSED FOR ACQUISITION
(1986 Estimates, Unless Otherwise Indicated)

| Effect | Alternative | | | | | | | | | City of Louisville 1980 | Jefferson County 1980 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Alternative 2A | | | | Alternative 3E | Alternative 4 | Alternative 5C | | | | |
| | Total | Southland Park | Toll Lane Yorktown | Fairdale | Total (Fairdale) | Total (Okolona) | Total | Highland Park | Standiford | | |
| Number of residents | 5,052 | 1,522 | 1,994 | 1,536 | 795 | 1,000 | 3,450 | 2,290 | 1,160 | 298,451 | 658,004 |
| Percent minority | 3.5% | 0.6% | 6.7% | 2.0% | 1.4% | 2.1% | 7.5% | 11.1% | .02% | 29.2% | 17.1% |
| Percent under 18 years | 30.6% | 25.1% | 29.2% | 37.9% | 32.5% | 34.2% | 22.8% | 23.3% | 21.8% | 25.1% | 27.7% |
| Percent 65 or over | 4.1% | 7.5% | 3.3% | 1.9% | 4.8% | 3.9% | 17.9% | 20.3% | 13.2% | 15.3% | 11.0% |
| Number of dwellings | 1,932 | 595 | 893 | 444 | 289 | 332 | 1,420 | 1,002 | 418 | 126,081 | 265,781 |
| Percent owner occupied | 54.1% | 67.6% | 31.4% | 81.8% | 83.4% | 75.6% | 63.9% | 51.3% | 94.3% | 52.3% | 62.2% |
| 1980 Mean value owner occupied | $31,100 | $28,600 | $42,400 | $25,100 | $20,500 | $34,800 | $26,200 | $17,300 | $38,100 | $33,100 | $42,700 |
| 1980 Mean contract rent | $180 | $168 | $196 | $140 | $134 | $146 | $100 | $103 | $170 | $143 | $171 |
| 1979 Mean income | -- | $17,800 | $16,700 | $17,600 | $17,600 | $18,300 | -- | $12,300 | $21,400 | $15,784 | $19,891 |
| 1979 median income | -- | $17,000 | $16,300 | $16,400 | $16,400 | $17,100 | -- | $10,100 | $20,500 | $12,174 | $16,664 |

Notes: (1) 1986 estimate data is an update of 1980 Census Data, developed by comparing 1979 and 1986 aerial photographs, and proportionally adjusting Census Data based on new construction and demolition.
(2) Neighborhood data in this table describes the portion of the area proposed for acquisition that lies within the boundary of that neighborhood.
(3) Income data is Census block-group level data that most closely correspond to the area proposed for acquisition.

Source: 1980 Census of Population and Housing.

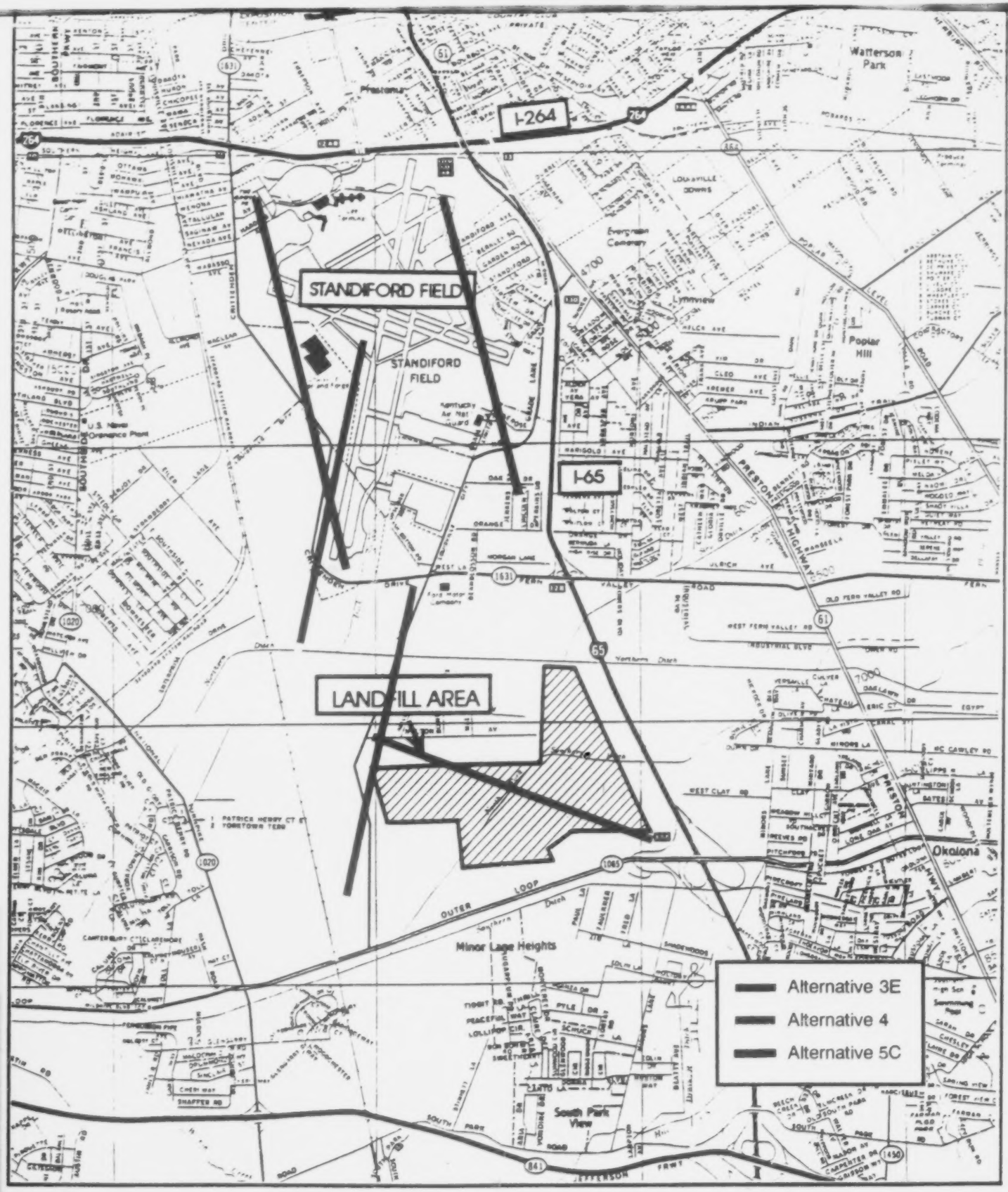


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Figure 4-8

LANDFILL VICINITY MAP

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(3)

No. 92-231

Supreme Court, U.S.
FILED
OCT 2 1992
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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COMMUNITIES, INC., AND DULWORTH & RIVES, INC.,
PETITIONERS

*v.*

JAMES B. BUSEY, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

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## QUESTION PRESENTED

Whether the Federal Aviation Administration properly approved the proposed expansion of the Standiford Field Airport in Louisville, Kentucky.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A35) is reported at 956 F.2d 619. The record of decision of the Federal Aviation Administration (App., *infra*, 1a-52a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. A petition for rehearing was denied on April 3, 1992. On June 30, 1992, Justice Stevens extended the time for filing a petition for a

writ of certiorari until August 1, 1992. The petition was filed on July 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

These consolidated cases arise out of a proposed expansion of the Standiford Field Airport in Louisville, Kentucky. On January 7, 1991, the Federal Aviation Administration (FAA) approved the expansion pursuant to the Federal Aviation Act of 1958, 49 U.S.C. app. 1301 *et seq.*, and Section 509 (b)(5) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. app. 2208(b)(5). App., *infra*, 1a-52a. The court of appeals affirmed. Pet. App. A4-A35.

1. Standiford Field Airport is located in a developed area within the city limits of Louisville, Kentucky, with residential neighborhoods primarily to the north, industrial areas to the south, and various residential and commercial centers or strips to the east and west. For years, political, civic, and business leaders in the area have been concerned with increasing congestion at the airport. The problem has worsened in recent years, as the airport has been a national hub for United Parcel Service (UPS) since 1981. Forecasts prepared for the local airport authority indicated that the capacity of the airport would be exceeded during certain peak hours by 1992. Pet. App. A6-A7; App., *infra*, 6a; Schimpeler-Corradino Associates, *Evaluation of Airport Facility Needs at Standiford Field: Technical Report No. 1, Forecast of Aviation Activities* at vii (Jan. 5, 1988), C.A. App. 572.

The local airport authority developed about two dozen alternatives for improving the airport, includ-

ing a new airport site, and commissioned a detailed study of the five most promising. See Pet. App. A33. The study determined that the only feasible alternative (Alternative 5C) was to construct two new parallel north-south runways on the existing airport site. See Schimpeler-Corradino Associates, *Evaluation of Airport Facility Needs at Standiford Field: Final Report, a Strategy for Improvement* (June 1988) [hereinafter *Strategy for Improvement*], C.A. App. 515. An alternate plan (Alternative 3E) to build a north-south runway east of the existing runway 1-19, paired with a close-in parallel runway west of runway 1-19, was rejected because it was "the most expensive option, requiring numerous unique and difficult engineering solutions" and because of proximity to a neighboring Ford plant. *Strategy for Improvement*, *supra*, at 20, C.A. App. 542. Another alternate plan (Alternative 4) to build an east-west runway parallel to runway 11-29 was rejected "because the east-west parallel runway pairing would result in almost all flights passing over the noise-sensitive areas east and west of the airport. Additionally, the new runway would be too remote and too short * * *, and Jefferson County's only landfill would be closed," leaving the area without adequate waste disposal facilities. *Strategy for Improvement*, *supra*, at 20-21, C.A. App. 542-543. See generally Schimpeler-Corradino Associates, *Evaluation of Airport Facility Needs at Standiford Field: Technical Report No. 3, Selection of Preferred Alternative(s)* (Apr. 1988), C.A. App. 750. Accordingly, in 1988 the authority approved Alternative 5C, the plan to construct two new parallel north-south runways. See Pet. App. A8-A9.

2. The authority applied to the FAA for a grant to defray costs of the expansion.[1] Several federal statutes constrained the FAA's discretion to approve the application. First, pursuant to Section 509(b)(5) of the Airport and Airway Improvement Act of 1982, the Secretary cannot approve such an application if the project is

> found to have significant adverse effect [on natural resources] unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect.

49 U.S.C. app. 2208(b)(5). Similarly, the Department of Transportation Act provides that the Secretary can approve a project that would "use * * * land of an historic site of national, State, or local significance * * * only if * * * there is no prudent and feasible alternative to using that land." 49 U.S.C. 303(c)(1). Finally, Section 102(2)(C)(i) of the National Environmental Policy Act of 1969 (NEPA) provides that "all agencies of the Federal Government shall * * * include in every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C)(i).

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[1] The FAA "is an administration in the Department of Transportation," 49 U.S.C. 106(a), headed by the Administrator of the FAA. The Administrator is obligated to carry out "duties and powers of the Secretary related to aviation safety (except those related to * * * hazardous materials)." 49 U.S.C. 106(g).

To determine whether the proposed expansion complied with these various statutory provisions, the FAA prepared an Environmental Impact Statement, which was completed in November 1990. See 55 Fed. Reg. 50,586 (1990) (notice of availability). The FAA agreed with the local authority's conclusion that Alternative 5C was "the only practical and feasible alternative, given the disadvantages of the other alternatives." *Department of Transportation, Federal Aviation Administration: Final Environmental Impact Statement, Standiford Field Airport, Louisville, Kentucky*, 3-17 (Nov. 1990) (EIS). It explained that "Alternative 3E would be extremely inefficient, pose severe engineering rquirements, and would not satisfactorily meet the forecast airside capacity need." *Ibid.* Similarly, the report concluded that "Alternative 4 would be extremely inefficient" for several reasons: it would result in almost all flights passing over noise-sensitive areas, require a second FAA tower, result in excessive taxi time for aircraft, because of the remoteness of the runway (more than four miles from the terminal), and would require closing the only landfill in the area. *Ibid.*

Another significant aspect of the EIS was analysis of increased noise that would result from the airport improvement project. In accordance with its customary practice, the FAA evaluated noise by use of a metric referred to as $L_{dn}$, which portrays the average day-night noise level, applying ten times the normal weight to noise between 10 p.m. and 7 a.m. The FAA operates in accordance with a federal, multi-agency determination that any level below 65 decibels is compatible with residential uses, so it draws a contour line surrounding the areas that would experience an $L_{dn}$ level of greater than 65 decibels. At the request of the EPA (which developed

the $L_{dn}$ methodology), the FAA also agreed to include in the EIS Single Event Level noise data, which show the volume of noise events. Pet. App. A16-A18; EIS 5-154 to 5-155.

On January 7, 1991, the FAA issued a Record of Decision, formally approving the project and federal funding of the Louisville Project. App., *infra*, 1a-52a. The decision reiterated the conclusion of the EIS that Alternative 5C was "the only practical and feasible expansion alternative." *Id.* at 10a; see *id.* at 48a (emphasis omitted) ("[t]here is no feasible and prudent alternative to the location of the airport and runways and all reasonable steps have been taken to minimize adverse effects"). The FAA noted that noise resulting from the project would affect historical sites in the area, but concluded that "planning has been incorporated in the project to minimize or mitigate the impacts, * * * and * * * there is no feasible and prudent alternative * * * that would provide greater relief (except closing Standiford Field)." *Id.* at 34a.

3. Petitioners commenced two proceedings challenging the FAA's action, a petition for review in the Sixth Circuit, and an action in the United States District Court for the Western District of Kentucky, which was transferred to the Sixth Circuit pursuant to 28 U.S.C. 1631. Petitioners contended that the approval was inconsistent with NEPA; 49 U.S.C. 303(c); and 49 U.S.C. app. 2208(b)(5). The court of appeals rejected petitioners' contentions and affirmed the FAA's decision in its entirety. Pet. App. A4-A35.

a. First, the court of appeals rejected petitioners' contention that the FAA improperly failed to consider whether historical sites outside the 65 decibel $L_{dn}$ contour would be "used" by the project because of

increased noise levels at those sites. Pet. App. A16-A27. The court noted that it should uphold the FAA's decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* at A18 (quoting 5 U.S.C. 706(2)(A)), and that other circuits already had rejected similar challenges to the FAA's use of the $L_{dn}$ methodology, Pet. App. A19-A21 (citing cases). In light of the record before it, the court concluded that "there is no basis for holding that the FAA's noise analysis was an abuse of discretion." *Id.* at A22. Accordingly, the court agreed with the FAA's conclusion that the project would not use historical resources located outside the 65 $L_{dn}$ contour. *Ibid.*

b. The court also rejected petitioners' claims that the FAA violated NEPA by failing to give sufficient consideration to the effect of its decision on hazardous wastes and transportation. Pet. App. A27-A30. With respect to the hazardous waste point, petitioners contended that the FAA failed to develop an adequate mitigation plan. The court disposed of this claim by reference to this Court's decision in *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989), which held that NEPA does not require an agency to present a fully developed mitigation plan before making a decision. Pet. App. A27-A28. Examining the agency's consideration of these issues, the court concluded that the EIS demonstrated "precisely the type of analysis explicitly approved of in *Robertson*—identification and discussion of various potential measures to mitigate the environmental impact of the [project]." *Id.* at A28. With respect to the transportation issue, the court concluded that it was appropriate for the FAA to defer analysis of the possible impact on transportation that might occur if a certain road were reconstructed, given that the

reconstruction would not occur for at least ten years. *Id.* at A29-A30.

c. The court also rejected petitioners' contention that the FAA failed to give adequate consideration to the proposed acquisition and destruction of the Standiford, Prestonia, and Highland Park neighborhoods.[2] Pet. App. A30-A32. The court noted that the land acquisition program was "fully discussed" in the EIS and the Record of Decision, *id.* at A31, and concluded that the FAA performed a suitable environmental analysis, *id.* at A32.

d. Finally, the court concluded that the Agency's analysis of alternative configurations to the Airport Improvement Project was reasonable. Pet. App. A32-A35. The court noted that the local airport authority had considered about two dozen alternatives, and had pared them down to five, of which it had conducted a detailed study, *id.* at A33, and that the EIS included a "thorough discussion" of each of those five alternatives, as well as "an explanation of why the alternative was either imprudent or infeasible." *Id.* at A34. Characterizing the record as "replete with extensive documentation of a very detailed evaluation," the court concluded that the FAA "reasonably rejected several of the alternatives that presented severe

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[2] Based on the view that excessive noise was incompatible with the residential nature of these neighborhoods, local authorities adopted ordinances to relocate residents from these areas. Petitioners challenged this action in the state courts, securing a holding from the Kentucky Supreme Court that the ordinances were unconstitutional. See *Prestonia Area Neighborhood Ass'n* v. *Abramson*, 797 S.W.2d 708 (Ky. 1990). Since that time, the airport authority has proceeded to acquire the properties under other statutory authority. See Pet. App. A14-A16.

engineering requirements," and also found the others to be "imprudent for reasons including their high cost, safety hazards, operational difficulties, and disruptions to landfills and noise-sensitive areas." *Id.* at A34-A35. In sum, the court concluded, petitioners' challenge to the review process "ignore[s] the enormous record evidence on feasibility." *Id.* at A35.

## ARGUMENT

1. Petitioners first contend that the court of appeals erred in not overturning the Secretary's decision that the project was the only "prudent and feasible alternative," 49 U.S.C. 303(c)(1); they argue that the Secretary instead should have approved Alternatives 4 and 3E. Pet. 13-38. This claim does not warrant review, however, because the court of appeals correctly upheld the agency's decision; moreover, petitioners offer no substantial reason to believe that the question whether the Secretary properly evaluated the alternatives in this case raises any legal issue of general significance.

a. As this Court has explained, the Secretary may accept an alternative that uses protected resources if he "find[s] * * * as a matter of sound engineering it would not be feasible to build the [project] along any other route," or if other alternatives present "unique problems" or cause extraordinary costs or community disruption. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 411, 413 (1971). As the court of appeals noted, "the administrative record is replete with extensive documentation of a very detailed evaluation," which "fully explain[s]" "[t]he reasons for deeming the other alternatives infeasible." Pet. App. A34. First, the Secretary's review of Alternative 3E concluded

that it would be "extremely inefficient, pose severe engineering requirements, and would not satisfactorily meet the forecast airside capacity need." EIS 3-17. As the Environmental Impact Statement explained, the "[i]ncrease in airfield capacity [under this alternative would be] insufficient to meet forecast needs for aircraft arrivals." *Ibid.* Similarly, the Secretary agreed that Alternative 4 was infeasible. *Ibid.* It would have created a single new runway far from the main terminal and at a great distance from the UPS terminal, which would require the use of a second FAA tower to control operations. Equally important, it would have required closure of the only landfill facility serving Louisville and Jefferson County and five surrounding counties. See *ibid.* The Secretary reasonably determined that creating an alternative landfill would pose problems of prohibitive dimensions.

Petitioners argue at length (Pet. 17-21) that the Secretary was required to select the alternatives they prefer, based on their contention that the record contains no evidence that those alternatives would have used any protected resources. The problem with this argument, of course, is that the statute does not require the Secretary to select *any* alternative that does not use protected resources; it requires him only to select "prudent and feasible" alternatives. Because the Secretary properly determined that the alternatives petitioners prefer were not prudent and feasible, he correctly rejected them.

b. Petitioners also contend (Pet. 32-38) that the decision of the court of appeals reflects less careful review of the Secretary's decision than the review evidenced by various decisions of other courts of appeals. We disagree. None of the cases cited by

petitioners supports this contention. First, three of the cases actually *upheld* the Secretary's determinations. See *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 203-204 (D.C. Cir.) (Thomas, J.) (determination that alternatives were imprudent), cert. denied, 112 S. Ct. 616 (1991); *Allison* v. *Department of Transportation*, 908 F.2d 1024 (D.C. Cir. 1990) (determination that noise from a project would not "use" protected resources); *Sierra Club* v. *Department of Transportation*, 753 F.2d 120 (D.C. Cir. 1985) (same). Second, *Citizen Advocates for Responsible Expansion, Inc.* v. *Dole*, 770 F.2d 423, 441-442 (5th Cir. 1985), rejected the Secretary's determination that the project would not "use" certain properties; it did not address the standard for determining whether alternatives are feasible and prudent. In the remaining cases, the courts did decide, on the records before them, that the Secretary erred in determining that other alternatives were not feasible and prudent. See *Druid Hills Civic Association* v. *Federal Highway Administration*, 772 F.2d 700, 716-718 (11th Cir. 1985) (rejecting determination that rested on "generalized and often contradictory attention" to the issue), cert. denied, 488 U.S. 819 (1988); *Stop H-3 Association* v. *Dole*, 740 F.2d 1442, 1450-1458 (9th Cir. 1984) (rejecting determination where Secretary "could not have reasonably believed" that there was no feasible and prudent alternative), cert. denied, 471 U.S. 1108 (1985). But the only substantiation petitioners can offer for their contention that the court of appeals applied a different standard in reviewing the record in this case is that the court of appeals concluded that the Secretary did not err. Given the deferential standard of review, and the defects in the administrative records at issue in *Druid Hills* and *Stop H-3*, that contention does not show disagreement

among the courts of appeals concerning the governing legal standard and thus does not justify review by this Court.

2. Petitioners also argue (Pet. 39-44) that the Court should grant review to resolve an alleged conflict in the circuits regarding the propriety of rejecting all alternatives that do not satisfy the transportation needs of the proposed project. In their view, the Secretary's decision to reject the "no-action alternative was improper because it rested on nothing more than the determination that the no-action alternative would not satisfy the transportation needs of the project. This argument ignores the Secretary's detailed consideration of the need for airport improvement. First, as the Record of Decision reflects, the Secretary considered whether the needs of the community could be met by rail or other modes of travel. In light of the nature of UPS's operations, the Secretary reasonably concluded that only an increase in airport capacity would accommodate UPS's needs. App., *infra*, 8a-9a. Similarly, the Environmental Impact Statement concluded that the need for increased capacity was so serious that the no-action alternative "would have continuing detrimental effects on the local and regional economy." EIS 3-1.[3]

Petitioners err in asserting (Pet. 40-41) that the decision of the court of appeals[4] conflicts with the

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[3] Petitioners suggest in their statement of the case (Pet. 5-8) that airport use since the time of the Secretary's decision indicates that the Secretary erred in evaluating the need for the project. That type of post-decision, non-record, evidence, however, has no relevance to the merits of the decision, which necessarily rested on evidence available at that time.

[4] It is not surprising that the court of appeals did not expressly address this point, because it was not presented as a

decision of the Ninth Circuit in *Stop H-3 Association* v. *Dole*, 740 F.2d 1442 (1984), cert. denied, 471 U.S. 1108 (1985). The *Stop H-3* court did not hold that the Secretary is barred from considering transportation needs in determining whether a project should be constructed; such a holding would vitiate the very purpose of the statute. Instead, the court "merely h[e]ld that the record before [it] d[id] not demonstrate that the stringent requirements of section 4(f) have been satisfied" with respect to the determination that the no-action alternative would be an imprudent alternative to the construction of a highway. *Id.* at 1458. As with petitioners' prior claim, there is no reason to believe that the court of appeals' fact-specific decision on this point shows judicial disagreement on the governing legal standards or otherwise raises a question of general legal significance.

Petitioners suggest that the Eleventh Circuit's decision in *Druid Hills* recognized a conflict between the law of the Eleventh Circuit on this issue—which would allow rejection of an alternative simply because it would not meet the needs a project was designed to meet—and the law of the Ninth Circuit established in *Stop H-3*, which requires an additional finding that the need for the project is sufficiently substantial to justify use of the historical resources. See Pet. 43 (citing *Druid Hills*, 772 F.2d at 715-716 n.18). As we explain above, the Secretary's decision in this case did not merely assume that the no-build alternative was inadequate; it rested on a considered determination that the project was vital to the region's economy.

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separate argument in the court of appeals, and received only cursory treatment in petitioners' briefs in that court. See Pet. C.A. Br. 18; Pet. C.A. Reply Br. 19.

Accordingly, this case apparently would have been decided in the same way even under the Ninth Circuit's view of the law. Hence, even if the issue had been properly presented and decided, this case would not provide an appropriate vehicle to consider the conflict noted in *Druid Hills*.

3. Finally, petitioners contend (Pet. 44-62) that the Secretary's decision violated NEPA.[5] Petitioners do not identify any specific legal question raised by the decision; rather, they simply suggest that the Secretary's determination is not adequately supported by the record. Accordingly, there is no reason to believe that this contention raises a legal question of general significance. In any event, petitioners' specific criticisms of the record are meritless.

a. First, petitioners argue (Pet. 54-58) that the Secretary's analysis was "fundamentally skewed" because of its reliance on the assumption that the Highland Park and Standiford neighborhoods would be condemned even under the no-action alternative. This contention is not supported by the record. As the court of appeals explained,

> the [local] governments * * * have been and remain committed to removing certain residential properties from the three neighborhoods near [Standiford Field] that are currently heavily impacted by aircraft noise. They have demonstrated that commitment by moving ahead with a land acquisition program—using strictly local money—long before there was any assurance that the airport project would, or could, be built.

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[5] To the extent petitioners' NEPA contention is based on petitioners' erroneous substantive claims (see Pet. 60-61), it is answered by the foregoing discussion.

Pet. App. A31; see EIS Addendum No. 1, at 1 ("the relocation of incompatible uses (homes, churches, neighborhood businesses) * * * is not dependent or contingent upon the [project]"); EIS 1-9 ("Urban Renewal Plans have been adopted and are being pursued independently by the City of Louisville and Jefferson County in four adjacent neighborhoods."). Because petitioners' contention on this point rests on the assumption that the Secretary and the court of appeals both erred in reaching this factual conclusion, there is no reason for this Court to grant review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951) (this Court rarely will review court of appeals determinations upholding agency findings); cf. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985) (factual questions upon which lower courts agree generally are not suitable for review by this Court). In any event, as the court of appeals noted, the program "is fully discussed in the [EIS], just as the [Kentucky judicial decision regarding the program] is fully discussed in the [Record of Decision]." Pet. App. A31; see App., *infra*, 38a-46a (discussing the condemnation program).

b. Petitioners also argue (Pet. 58-59) that the Secretary should be required to issue a Supplemental Environmental Impact Statement giving further consideration to single-event noise data that are not relevant under the FAA's $L_{dn}$ methodology. This argument, however, can have merit only if it were improper for the FAA to rely on its expert conclusion that the $L_{dn}$ methodology is an appropriate tool for measuring the effects of airport noise. In light of the court of appeals' conclusion that the FAA's methodology complies with applicable statutory re-

quirements, see Pet. App. A16-A27, and petitioners' determination not to press that issue in this Court, see Pet. 59, petitioners' argument regarding consideration of the single-event data is beside the point and thus does not merit review.[6]

c. Finally, petitioners argue (Pet. 61-62) that the Secretary did not adequately consider the impact of the project on transportation, because he did not consider the effect a permanent closure of Crittenden Drive would have on transportation in the area. The EIS correctly noted that the road would be closed for at least ten years and it thoroughly discussed the expected dislocation the closure would cause. EIS 5-67. The EIS also stated that the Secretary would defer examination of the environmental impact of any relocation of the road until plans for relocation were developed. *Id.* at 1-10. As the court of appeals concluded (Pet. App. A29-A30), this approach is entirely reasonable.

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[6] In any event, as the court noted (Pet. App. A21), the FAA did analyze the single-event data in this case, so there would be little or no reason for a Supplemental Environmental Impact Statement even under petitioners' view of the appropriate methodology.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1992

APPENDIX

# RECORD OF DECISION

FOR

PROPOSED TWO NEW PARALLEL RUNWAYS
AND ASSOCIATED WORK

AT

STANDIFORD FIELD
LOUISVILLE, KENTUCKY

Date: January 7, 1991

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
SOUTHERN REGION
ATLANTA, GEORGIA

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Department of Transportation
Federal Aviation Administration
Record of Decision

Proposed Two New Parallel Runways and
Associated Work
Standiford Field
Louisville, Kentucky

## I. PROPOSED PROJECT:

The proposed project (commonly referred to as the "Louisville Airport Improvement Program" or "LAIP") involves construction and operation of two new parallel north-south runways including full length parallel taxiways and installation of Category III Instrument Landing Systems (ILS) for the south ends of the runways and Category I ILS's on the north ends. The project also involves various associated items including runway and taxiway lighting, land acquisition. road relocations, relocation of the Airport Traffic Control Tower (ATCT), and construction of a new aircraft rescue and fire fighting facility.

The Regional Airport Authority of Louisville and Jefferson County, Kentucky (RAA) has submitted an environmental assessment covering the proposed project together with an appropriately reviewed Airport Layout Plan (ALP) and a preapplication for federal assistance in the amount of $224 million.

The project is needed to enhance the capacity of the national system of airports which is currently one of the most critical issues in the aviation industry and to meet current and forecasted air passenger and cargo demands at Standiford Field (SDF).

## II. FEDERAL ACTIONS REQUIRED TO IMPLEMENT THE PROPOSED PROJECT:

The major Federal Aviation Administration (FAA) actions are approval of an Airport Layout Plan and approval to provide federal funding for eligible airport development projects. Major federal actions also include issuance of a 404 permit by the U.S. Army Corps of Engineers (the Corps).

Specific dependent elements of the FAA approval actions include:

Determination of effects upon safe and efficient utilization of air space.

Determination of conformance with FAA design criteria and approval of construction plans and specifications.

Implications concerning Federal Grant Agreements with consideration of the provisions of Federal Aviation Regulations (FAR, Parts 77, 150, 157, and 169).

Approval of revised Airport Certification Manual (FAR, Part 139).

Approval of revised Airport Security Plan (FAR, Part 107).

Relocation and upgrading the existing Airport Traffic Control Tower and Terminal Radar Approach Control (TRACON) facility.

Relocation of:

* Airport surveillance radar (ASR);

* Instrument landing system, runway visual range (RVR), and associated visual navigation aids (NAVAIDS) on Runway 1/19 to the new Runway 17R/35L;

* Remote receiver facilities;

* Airway Facilities Sector Field Office; and

* FAA power and control cables serving the airport facilities.

Establishment of new ILS's, Distance Measuring Equipment (DME), RVR, and approach lighting systems (ALS's) for the new Runway 17L/35R.

Establishment of new flight procedures, including visual and instrument procedures, missed approach procedures, and departure procedures of each new runway (FAR, Part 95); cancellation of existing procedures upon closure of Runway 1/19.

Development of FAA facility procedures for departure headings, simultaneous approaches, air traffic procedures and position responsibilities.

FAA Air Traffic Controller training for new scheme of airport operations, including new simultaneous approach procedures and facilities and modified position responsibilities.

Development of new FAA video map for new runway and airspace.

Planning for new FAA facilities (ATCT & TRACON) to include types of equipment, layout, additional radar scopes, and radio equipment for monitor positions.

Maintenance of close coordination with RAA and appropriate FAA program offices, as required, for safety during construction and runway closures.

Approval of the Environmental Impact Statement (EIS).

III. PURPOSE:

The FAA supports the objectives of the proposed project as being justified and needed based on air transportation system capacity and aeronautical demand at Standiford Field. System capacity is one of the major issues facing aviation in the United States today. SDF ranks 75th on the FAA list of top 100 airports based on 1989 passenger enplanements.

Standiford Field is also a cargo hub for the United Parcel Service (UPS) small package services which is a real growth area in the air cargo industry. One indication of the magnitude of the small package market is shown by the shipment data reported to the Air Transportation Association. According to the data reported for 1989, 15 carriers transported a total of 409 million packages, which is a 16.9 percent increase over the previous year. This represents $6.7 billion in revenues. UPS's growth and commitment at Standiford Field can be measured by the multimillion dollar facility presently being constructed for its operation.

The National Transportation Policy Strategies for Action published by the Department of Transportation in February 1990 lists six key themes in its planned agenda to fulfill short and long term needs. The first theme listed is "maintain and expand the nation's transportation system."

The capacity at SDF will be exceeded in some important, peak afternoon and evening hours by 1992.

The purpose of the project is to enhance the capacity of the national system of airports as well as meeting current and forecasted air passenger and cargo demands at SDF.

The existing airport configuration permits 26 TFR arrivals per hour and this capacity is currently being exceeded on a frequent basis. By 1992, Instrument Flight Rules (IFR) arrival capacity will be exceeded daily between 11:00 p.m. and 1:00 a.m. IFR conditions occur eight percent of the time (approximately one month per year).

Thirty Visual Flight Rules (VFR) and IFR departures can be accommodated daily. This capacity will be reached or exceeded at 1:00 a.m. to 2:00 a.m. and 4:00 p.m. to 5:00 p.m. by 1992.

Capacity constraints will initially impact the UPS operation most severely because Louisville is the central distribution point for the Next Day and Second Day Air Delivery service and there is little flexibility in this type of operation. As the airport activity level increases, the delays will become more pronounced and widespread. The FAA concludes that the system capacity increases needed to fill this demand should be accomplished at SDF. The air transportation service is very important to Louisville and its economy as well as the national air transportation system. RAA and FAA have already invested significant effort and moneys into the facilities at the airport.

## IV. ALTERNATIVES:

In determining the best solution for the SDF capacity problems, the following alternatives were considered:

No action.
New Site/New Airport.
Service from Other Airports.
Alternative Modes.
Improvement/Expansion of Existing Airport.

Analysis of each of the available alternatives indicates that the two viable alternatives are "no action" and the proposed project. While the FAA recognizes that detailed, in-depth consideration is being given to only two alternatives, consideration has been given to other feasible alternatives to the extent that they were reasonable and viable. Alternative modes alternate is being rejected on the basis of high cost of automobile and bus transportation for distances over 250 miles particularly in the case of business travel due to the time element. Rail transportation is being rejected on the basis that there is no rail passenger service at Louisville as well as the fact that it could not provide the nationwide overnight package service provided by the air cargo operations at SDF. The FAA has also considered the alternative of the UPS central "hub" operations being located at an airport other than SDF. UPS statements communicated to the RAA and FAA throughout the process of developing the proposed project do not indicate any corporate disposition to such an alternative. While the FAA does not control UPS corporate decisionmaking and should not interfere with its business choices, it is recognized that proceeding with the "no action" alternative could well be a factor in its future conduct of business at SDF and potentially elsewhere. However, in light of the expressed commitments of UPS to its continuing presence at SDF to the extent the airport facilities permit, and the absence of any dis-

cernable indication of the likelihood of a change in its intentions, the FAA believes it would be an unproductive and unnecessary exercise to engage itself in protracted speculation of what might be the case "if" or when UPS altered its declared course in its commercial enterprises as they are constituted and projected at SDF. It has and continues to make substantial economic and capital investment in its Louisville facilities. The central issue is whether airport improvements should be accomplished at SDF to provide increased capacity to meet the demands for UPS and passenger service.

For years political, civic, and business leaders in the Louisville area have been concerned with the growing lack of adequate air transportation service and facilities to attract that service. An inquiry into the siting and construction of a new, larger airport to serve Louisville and surrounding areas has a long history. Preliminary work began as far back as the early 1970's when, as discussed at length in the Final Environmental Impact Statement (FEIS), numerous sites were studied to determine the ones most acceptable from a number of competing objectives. An extensive FAA funded site/environmental study was conducted as part of the planning. Eventually after a lengthy process, the planning for a new airport, even at the identified preferred site, was abandoned. This was due largely to the high costs, the lack of a responsible sponsor for the airport site, as well as the lack of state and local political, institutional, and public support for the project. The new airport proposal had also met the opposition of the Governor.

The more recent efforts to improve and develop air transportation in the Louisville area, revisited those

prior studies and built upon them. Based on the updated study, it is evident and clear that there remains no viable support for constructing a new airport at any of the proposed alternative sites. The environmental problems associated with such a project today would be considerable. There remains no state or local political or public support for a new airport site; there is no responsible operator/sponsor for a new airport. Absent any practical viability for considering a new airport at a different site, a realistic assessment of the local situation indicates that the choices presented to the FAA are effectively limited to the issues of improving or not improving the Louisville airport and utilizing essentially its existing site.

Thus, it is important that RAA have built into its proposed project many features designed to avoid airport design and operation problems as well as being designed with a great deal of sensitivity to the airport environment. Five separate alternatives for expansion of the existing airport were initially developed, evaluated, and considered in selecting the proposed configuration of the project as the most practical and feasible. The "preferred" alternative, subsequently, was further modified to realign the runways when, in response to public input, it was found that it would improve the project and mitigate several of the problems that had been identified.

Five different alternatives for expansion of the existing airport were considered and evaluated before selecting the proposed project as the only practical and feasible expansion alternative. The FAA also evaluated an additional runway alignment suggested during the comment period and found it unacceptable.

The possibility of altering the alignment of the west runway was examined. The flight track could be moved about 1,000 feet to the west of Central Park by rotating the south end of the west runway to the east. The separation criteria for parallel runways operating simultaneously and independently under IFR conditions could be satisfied. Parallelism of ±2.5 degrees must be maintained to achieve the capacity increase necessary. Some benefit for Old Louisville could be obtained. However, the benefits would be outweighed by additional relocation requirements, project delay, and increased noise impacts to other portions of the community.

Based on reasons discussed in Section 3 of the FEIS and summarized above, as well as the fact that the airport authority and other state and local governmental entities were committed to the proposed project through bonds and state legislation authorizing state funding for the project, the FAA has concluded that there are only two reasonable alternatives relative to the decisionmaking process in this situation. These alternatives are: (1) the proposed project, and (2) the no action alternative. The proposed project is the preferred and environmentally preferred alternative. A demand on the air transportation services, including cargo and package service, will continue to increase at SDF with or without the project; with the project, improvements can be made which will satisfy that demand and, at the same time, accomplish significant improvements in the compatibility of the airport to its surrounding community by environmental enhancements and mitigation built into the project and related activities.

## V. FAA INVOLVEMENT

The FAA has been fully involved in the project processes, Representatives participated in the initial prescoping meeting for the environmental assessment (EA) on October 10, 1988, and the public hearings on August 31, 1989, in addition to numerous other meetings. The FAA also reviewed the EA and accepted the document on January 9, 1990. This document was systematically examined for conformance with FAA procedures and was found to be properly prepared and addressed the environmental impacts sufficiently to proceed with a DEIS. During this process, RAA responded to numerous requests from FAA for adidtional information and material to validate various data. It was also revised as a result of comments received during the public hearing process. The FAA then conducted a scoping process based on the EA. The *Federal Register* Notice of Intent to prepare a DEIS was published on January 26, 1990. Based on FAA review and comments received through the scoping process, the DEIS was prepared and submitted for federal review and public comment. The notice of availability of the DEIS appeared in the *Federal Register* of May 25, 1990. The comment period ended July 9, 1990.

Above and beyond, but in light of, the environmental process, the FAA is making the following determinations, based on its application of applicable FAA standards, criterion, and guidelines:

> Straight-in approach procedures can be established for each end of each runway (RWY's 17L/35R and 17R/35L). The procedures will be

aligned relative to the extended runway centerlines (approximately 165 degree/345 degree).

A precision Instrument Landing System (ILS) with Distance Measuring Equipment (DME); Medium Intensity Approach Lighting System with Sequenced Flashing Lights (MALSF), Runway Visual Range (RVR), Touchdown Zone Lighting (TDZ), and Runway Centerline Lighting will provide category I approach capability to RWY's 17L and 17R. Expected landing minimum is 200 feet above touch down and RVR 1800 feet visibility. When TDZ and runway centerline lighting is not available, the RVR visibility minimum would be 2400′.

A precision ILS with DME, High Intensity Approach Lighting System with sequenced flashing lights (ALS-2), RVR, TDZ and Runway Centerline lighting will provide category I/II/III capability with a landing minima of RVR 600 feet visibility for RWY's 35L and 35R. Taxiway centerline lighting would reduce the minima to RVR 300′ visibility.

The configuration will also provide non-precision localizer approaches with an approach minimum descent altitude of 250 feet above the highest obstacle in the final approach segment and an RVR minima of 5000′ visibility.

The ILS glide slope will be set at three degrees. Approaching aircraft will not fly at an altitude lower than the three degree slope. The exact location of the glide slope facility will be determined in the detailed planning process.

The ALS land for each runway extends 2400 feet from the runway threshold along the extended runway centerline. The obstacle clearance area is 200′ beyond the last light station. The obstruction plane is at or below a 50:1 slope. No objects may penetrate the light lane plane. All land and clear areas necessary for the protection of FAA facilities must be provided by the RAA.

The ILS final approach obstacle clearance surface primary areas and its wide transitional surfaces are described in FAA Order 8260.3B, TERMINAL INSTRUMENT PROCEDURES (TERPS) HANDBOOK, and FAA Order 8260.36, CIVIL UTILIZATION OF MICROWAVE LANDING SYSTEM (MLS). The three degree glide slope requires a 34:1 obstacle clearance slope for the inner section (10,000′) and a 29.5:1 obstacle clearance in the outer section (40,000′). Each side transitional obstacles clearance surface is 7:1. These "imaginary" surfaces apply to each new runway approach end.

Category II, ILS touchdown area, missed approach area and side transitional obstacle clearance surfaces (in accordance with Advisory Circular 120-29) will apply to approach runway ends of RWY's 35L and 35R. This is in addition to the Category I ILS approach obstacle clearance slopes. These surfaces must not be penetrated by obstacles.

Locator Outer Marker (LOM) sites may not be available in the built up metropolitan area. Therefore, Distance Measuring Equipment

(DME) must be installed at each localizer as a substitute. DME fix error (±.5 nm) will apply to required fixes and obstacle clearances.

Radar vectors to straight-in approaches will be the rule, but procedure turn (PT) capability will be provided as a back-up with each instrument approach. Procedure turns may be designed on the east side of the approach course for RWY's 17L and 35R and on the left side for RWY's 17R and 35L. An accommodation with special airspace R-3704 A/B will be necessary for procedure turn to RWY 35L. If not possible, no procedure turn will be authorized for that approach and radar vectors will be required.

The instrument approach Category D (2.3 nm radius) Circling Area for the airport must be enlarged commensurate with the geographical enlargement of the runway's layout.

Existing RWY 1/19 will be closed after completion of RWY's 17R and 35L. Its facilities (ILS, RVR, approach lighting) would be expected to be relocated to proposed new RWY 17R/35L. Existing RWY 1/19 instrument approach procedures, missed aproach procedures, and departure procedures would be cancelled.

Runway 11/29 will remain open. However, no usable site for RWY 29 glide slope antenna will be available after commissioning of RWY 17L/35R occurs. Therefore, precision ILS approaches to RWY 29 will be cancelled and the glide slope removed from service. Localizer RWY 29 non-precision approach will remain usable only when taxiing aircraft are held outside the localizer

critical area. The critical area would be penetrated by aircraft using new RWY 17R/35L and its associated parallel taxiways). Therefore, usage of RWY 29 for landings would probably be extremely limited. Runway 11 will retain a VFR landing usage role. In the event a decision is made to retain the GS on RWY 29, this will preclude achieving CAT III minimums on RWY 35R. Additionally, it will restrict CAT III minimums to a decision height of 150 feet and visibility to 1600 RVR. This would result in a limited net gain of only a 50 foot reduction in decision height and 200 foot reduction in RVR visibility versus CAT I minimums.

For noise analysis purposes, the CAT III operations were split evenly between the two parallel RWY's. If CAT III cannot be achieved for the east RWY, then all CAT III operations must be diverted to the west RWY. FAA records indicate that only six days per year have CAT III weather conditions varying from .5 to 4 hours in duration. Because of the limited time frame of CAT III conditions, the CAT III operations were insignificant insofar as an impact on the noise analysis. Therefore, a decision to limit RWY 17L/35R to CAT I operations will not impact the noise analysis.

Missed approach procedures to proposed RWY 17R/35L would be expected to utilize the missed approach procedure currently existing for RWY 1/19, which turns west to DAMEN holding fix. New missed approach procedures for RWY 17L/35R must be developed with a turn to the east

probably to Louisville (IIU) VORTAC holding fix.

Controls for existing taxiways at the approach end of proposed RWY 17L must be redesigned to preclude aircraft taxiing through ILS obstacle clearance slope surfaces (including the side transitional slope).

The Airport Layout Plan (ALP) was submitted by RAA in preliminary form on 11/16/89, 12/19/89, 3/27/90, and 8/14/90. Formal FAA comments were transmitted to RAA on 1/2/90, 2/22/90, 5/30/90, and 9/14/90, respectively FAA review was based on compliance with FAA airport planning and design criteria standards and the layout has been determined to be safe and efficient utilization of airspace. The document would be technically acceptable for FAA approval upon an acceptable environmental finding.

Runway centerline to centerline separation exceeds 4300 feet which is the minimum requirement for simultaneous approaches under instrument flight rules. Parallel taxiways accompany each new runway. Separation from runway centerline to taxiway centerline is 450 feet and is acceptable.

Separation standards in accordance with Advisory Circular 150/5300-13 dated September 29, 1989, were applied to ensure the aircraft characteristics relating to aircraft approach category D and Airplane Design Group V were accommodated on the airfield's geometric layout.

Pavement strength will accommodate the following landing gear configurations:

| | |
|---|---|
| Single Wheel (lbs.) | 75,000 |
| Dual Wheel (lbs.) | 170,000 |
| Dual Tandem (lbs.) | 360,000 |

The layout of the runway safety areas are of the appropriate dimension to accommodate the design group D-V aircraft.

Runway object free areas on the new runways meet the standard length and width requirements for design group D-V aircraft with precision approaches.

All runway protection zones meet the appropriate standard dimensional requirements for precision instrument runways.

Runway lenghts identified provide the following usable runway surface:

17L-35R 7,800′×150′
17R-35L 10,000′×150′

The runway lengths have been determined needed for the proposed project.

Existing RWY 11-29 will remain in operation throughout the construction phrase and continue to operate thereafter. The safety and object free areas on RWY 11-29 were revised to incorporate the latest version of FAA design standards. The declared distance concept, as addressed in FAA Design Standards Advisory Circular AC 150/5300-13, was utilized. Runway 1-19 will be closed after the two new parallel runways are constructed.

The ALP was reviewed by the Memphis Airports District Office (ADO) and coordinated with the Air Traffic Division, Flight Standards Division, Airway Facilities Division and the Civil Aviation Security Division. The ALP documents are located in the Memphis ADO and include a narrative report and the following drawings:

Airport Layout Drawing (1990, 1993, 1995)
Airport Airspace Drawing (1995)
Runway Protection Zone Drawing (4 sheets)
Terminal Area Drawing (1995)
Land Use Drawing (1995)
Airport Property Map (1995)
Wind Rose and Data Table

The Airport Airspace drawing defines FAR Part 77 surfaces. Existing obstructions penetrating Part 77 surfaces are identified with recommended actions to remove, relocate or light the object.

The Land Use Drawing identifies the allocation of land needed to complete the airport development. Land uses compatible to the airport under Part 150 criteria, are identified.

The Airport Property Map Drawing identifies existing and proposed property lines.

The landfill issue (discussed in the FEIS) was reviewed. First, the proximity of Standiford Field to the landfill has not resulted in problems in the past, and there is no expectation of problems in the future based on the RAA's continuing commitment to its strategic plan for wildlife hazard management, discussed below. Second, there must necessarily be the presumption that

a potential hazard exists, merely by the fact that landfills do attract birds. This issue has been given appropriate and extensive consideration during development of the proposed expansion of Standiford Field. Specifically, the RAA, within the framework of the environmental assessment process for the proposed project, sponsored a fourteen-month survey of bird activity at the landfill and in the airport environs. The survey was managed by the Animal Damage Control (ADC) Branch of the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS). The completed survey and the analysis of findings are documented in the Environmental Impact Statement. The RAA, in cooperation with USDA/APHIS-ADC, was able to define a permanent, long-term program to maximize air operations safety relative to birds and other wildlife.

Formulation and adoption of a Strategic Plan for Wildlife Hazard management and an Annual Work Plan, which are part of the results of the USDA/APHIS-ADC study, are intended to provide the framework for implementing the wildlife hazard management program to which the RAA represents it is committed.

Originally, it was contemplated that formulation of a wildlife hazard management function would occur only with implementation of the LAIP. However, the RAA has determined that such a function would be useful and beneficial within the current context of airfield operation. The control program already has been incorporated in the Airport's Certification Manual, upon re-

view by the FAA; it became effective July 1, 1990.

Finally, the FAA has concluded that the landfill cannot be closed and that airport expansion projects have placed an existing landfill that previously met FAA minimum separation standards into a noncomplying position. Based on the FAA's continuing commitment to its wildlife hazard management plan, the FAA has determined that wildlife hazard potentials can be effectively controlled. This decision in no way reflects a change in agency policy that landfills should not be established or expanded within the criteria contained in FAA Order 5200.5A.

During discussions with the airport owner's representatives, the FAA realized that they had assumed simultaneous straight-out departures on the new runways. FAA Order 7110.65 requires departure courses to diverge by at least 15 degrees for simultaneous operations unless there is acceptable use of visual separation. That could not be estiblished for SDF straight-out departures when weather conditions are less than 2,500-foot ceiling and visibility 5 miles. At other times, the 15 degree course separation will apply, thereby permitting full departure capacity at all times.

The FAA was also concerned about the effects of Restricted Area R-3704 (associated with Ft. Knox) on the ability of the controllers to vector arrival traffic to the Runway 35L final approach course. Negotiations with the U.S. Army have resulted in an agreement to restructure R-3704

vertically. Although the level of activity will remain the same as in the past, this restructure will assist the Standiford tower in vectoring traffic to/from the proposed runways. The lateral boundaries of R-3704 will remain as they are now but will limit the controller to vectoring only one aircraft at a time from the west to the final approach course of Runway 35L. This will somewhat limit the runway's achieving its full potential capacity during periods of heavy arrival traffic from the south; however, the proposed runway configuration offers significantly more capacity than that offered by the present runway configuration.

The relocation and establishment of NAVAIDS as discussed in the FAA involvement section are preliminary. Actual requirements must be determined during the detailed planning process. Memorandums of Agreement for reimbursement from the RAA to the FAA for relocation of facilities occasioned by airport development will be necessary.

The RAA must protect line-of-site (LOS) from the existing ATCT to the airport operations areas until it is relocated and then protect LOS from the new tower. Additionally, the RAA must submit all proposed construction designs for FAA approval relative to LOS and electromagnetic interference (EMI) protection for NAVAID and ATC facilities.

Safety and security aspects related to the closure of Crittenden Drive and access to the airport by the Louisville Fire Department's Engine Company Number One have been addressed fully in

the FEIS. This unit already has airport access to respond to fires. The RAA will grant the Fire Department controlled access through the airfield via the service/security road system to points south of the airport and Fern Valley Road. The Fire Department will certify annually all drivers who would potentially operate vehicles on the airport. A description of the annual training program and identification of all certified drivers will be included in the airport certification manual which must be approved annually by FAA. The RAA will also revise its security plan, based on LAIP, and obtain FAA approval. FAA's preliminary reviews indicate that airport security can be maintained with the planned Fire Department access.

## VI. MAJOR IMPACTS AND MITIGATION MEASURES:

The major impacts of the project and the mitigation measures upon which federal approval is contingent are:

### A. *Noise and Social:*

#### 1. General:

As part of on-going dialogue between the FAA and the U.S. Environmental Protection Agency (EPA), the agencies agreed to conduct certain supplementary airport noise measurements for aircraft on a single event basis, as well as to provide additional technical discussion/analysis reflecting the noise levels generated by aircraft. While the EPA agreed the FAA has performed

adequate and proper noise analysis in conducting its environmental and airport noise studies, the FAA agreed to include those measurements and discussions in its environmental documentation for certain proposed projects, including the proposed Louisville Airport Improvement Project (which was already being developed at that time). The implementation of that agreement is reflected in the noise analysis sections of the FEIS (Section 5) and is fully supported by the EPA as meeting the requirements of the National Environmental Policy Act of 1969 (NEPA) and related implementing regulations and directives.

2. Impacts:

Approximately 16,132 people will be within the 1995 65 Ldn noise contour. As a result of mitigation measures, this figure will be reduced to 1,650 by 2003, which is the mandatory compliance deadline for conversion to Stage III aircraft. Most aircraft are expected to be in compliance by the initial 1999 compliance date.

In contrast, the "no action" alternative would result in 42,00 people in the 65 Ldn in 1995 and 3,445 by 2003.

a. The "no action" alternative (including the local land use program) involves:

* Relocation/demolition of approximately 1450 residences, affecting about 3500 persons; 15 churches and 60 businesses are also affected under the local land use program.

* Closing of two schools.

* Loss of funds for two community ministries.

* Potential revenue impact on Edgewood Fire District.

b. The proposed project will include the following additional impacts:

* Purchase of 150 residences in Edgewood.

* Acquisition of one church, 40 businesses and residences in the Tuberose community.

3. Mitigation:

Specific noise abatement measures were incorporated into the LAIP and these are already an integral part of the proposed project itself.

* UPS operation of only Stage III aircraft in Louisville by 1995 when the LAIP is fully completed. (See attached UPS commitment of Stage III aircraft.)

* Contra-flow aircraft operating procedure (i.e., landings from the south, take-offs to the south) beginning no earlier than 10 p.m. and ending no later than 7 a.m., weather and traffic permitting. Maximize operations occurring south of the airport over less congested areas.

In addition, the RAA has agreed to the following mitigation actions with or without federal assistance.

* Prohibition of routine late night maintenance runups, unless acceptable attenuation is provided. Implementation: Upon completion of the LAIP.

* A preferential runway use program, subject to FAA approval, instituting maximum

daytime utilization of Runways 17R and 17L for south departures.
Implementation: Upon completion of the LAIP.

* Straight-out, extended flight track departure procedures from each new runway, except in adverse weather conditions when a 15-degree turn from the west runway would be in effect.
Implementation: Upon completion of the LAIP.

* Soundproofing the Minor Lane Heights Elementary School between the time the project is approved and the opening of the first (east) runway.
Implementation: Start 1992: Complete 1993.

* A program of soundproofing at the University of Louisville Belknap Campus will be implemented as specified and agreed to in a letter from the RAA to the President of the University, dated August 17, 1989.
Implementation: As expeditiously as possible, but no later than 5 years of completion of the LAIP.

* Soundproofing of the residence at 2111 South Park Road. This site has been determined potentially eligible for the National Register and would be within the 65 Ldn noise curve in 2003, when the fleet is all Stage III.
Implementation: Upon completion of the LAIP.

* Acquisition and relocation of businesses and residences under the LAIP would be in

conformance with the Uniform Relocation Assistance and Real Property Policies Act of 1970 as implemented under 49 CFR Part 24.

* The property tax base for the Edgewood Volunteer Fire District will be affected in the short term. The RAA, city of Louisville and Jefferson County will cooperate in sustaining the Fire District until redevelopment has occurred sufficiently to replace lost revenues.

* Airport-related development associated with the airport expansion will result in increased traffic on Fern Valley Road and Grade Lane. The intersection will be rebuilt to accommodate this increase and establish access to the central portion of the airfield.

* The closing of Crittenden Drive will deny the Louisville Fire Department's Engine Company No. One to respond to fires south and east of the airport, primarily industrial sites. Therefore, the RAA will grant controlled access through the airfield via the service/security road system to points south of the airport and Fern Valley Road. The Louisville Fire Department would be required to certify on an annual basis all drivers who potentially would operate emergency vehicles on airport property. A description of the annual training program and the identity of all certified drivers would be made a part of the Airport Certification Manual, which must be approved annually by the FAA.

Additionally, the RAA adopted a voluntary sales program for the Edgewood Neighborhood, residential property within the 75 Ldn in the 1995 contour map. The adopted plan included 60 homes within the 75 Ldn and about 90 homes which are outside the 75 Ldn to avoid splitting blocks. This plan will be accomplished with federal assistance.

To complement the environmental processes for the proposed project, the RAA also commits to completing a Part 150 Noise Compatibility Study as soon as practical following approval of the LAIP. An *Airport Environs Land Use Compatibility Plan* has been prepared in conjunction with the city of Louisville and Jefferson County and incorporates many of the land use measures which must be in the Part 150 study. This study is being reveiwed locally. One strategy to be included in the Part 150 Study would be relocation of occupants of Holiday Mobile Home Park south of the Outer Loop.

B. *Air Quality*:

(1) Impacts:

The total regional pollutant burden will be lower because the pollutant burden associated with the regional roadways is expected to decline significantly due to improved antipollutant control devices and laws. The only pollutant expected to be worse in 1995 and 2010 is sulfur dioxide, and this is almost entirely identified with the regional roadway systems.

EPA has determined that the project is acceptable from an air quality standpoint. The Governor of the State of Kentucky has certified (FEIS, Appendix A-105) that there is reasonable assurance that the LAIP

will be located, designed, constructed and operated as to comply with applicable air and water quality standards.

(2) Mitigation:

The RAA has indicated that it will commit to reduce on airport sources of air pollution to the maximum extent practicable. During construction, omissions of fugitive dust associated with the construction and demolition activities will be minimized with proper pollution control measures. All asbestos materials, as well as other hazardous materials encountered (known and unknown) will be handled in accordance with all applicable regulations of the Jefferson County Air Pollution Control District, the State of Kentucky, and the Federal Government.

C. *Water Quality*:

(1) Major impacts:

Relocation of population through the land acquisition program will reduce the local flow of sanitary sewage, improve flood control south of the airport and permit greater control of deicing chemicals.

(2) Mitigation:

Hazardous substances or contaminated soils will be removed or contained in accordance with applicable laws. Abandoned underground storage tanks (UST) will be removed and the area tested for spilled materials. Contaminated soil, if present, will be removed, consistent with Federal, state and local laws. All clean up costs will be borne by the property own-

ers or, if necessary, the RAA. Any new storage facilities must meet EPA regulations for construction and installation to minimize leakage potential.

Sewers of the Louisville and Jefferson County Metropolitan Sewer District (MSD) will be extended to serve all new buildings to avoid new discharges of waste water to surface streams. Waste water generated by new facilities, which is not compatible for discharge to the MSD sewers, will be contained and properly disposed of at a certified facility.

Major drainage improvements will be designed for the airfield complex to minimize downstream flooding associated with existing and future levels of storm water runoff. New drainage facilities serving areas where aircraft are fueled or fuels are transferred will be built with fuel separators to capture spilled fuels. Wash water from aircraft washing facilities built as part of the improvement program will be diverted to the MSD sewers. Likewise, contaminated drainage from areas where deicing chemicals are used (runways, taxiways, and aircraft aprons) will be conveyed to detention basins for transport to the MSD sanitary or combined sewer system or evaporation in place. UPS has its own surface drainage system to divert contaminated storm drainage to MSD sanitary sewers.

Stringent measures will be taken to control soil erosion during the demolition and construction phases. Erosion control measures will include: diversion channels, vegetative buffers, channel protection, silt fences, and silt basins.

The Governor of the State of Kentucky has certified (FEIS, A-105) that there is reasonable assurance

that the LAIP will be located, designed, constructed and operated so as to comply with applicable air and water quality standards. The State of Kentucky has issued a Water Quality Certification (Section 401).

D. *Section 4(f) Properties*:

The construction of the LAIP will result in the taking of Grove Park, the adjoining Highland Park Community Center, and Lowell School. The RAA has agreed to replace "in kind" the facilities and services of Grove Park in a formal Memorandum of Understanding (FEIS, Appendix A-98). Mitigation for Lowell School has been included in a Memorandum of Agreement with FAA, RAA, Kentucky State Historic Preservation Office, and the Advisory Council on Historic Preservation.

Beginning in 1995 with the proposed LAIP, the following Section 4(f) properties would be affected by noise levels at or above 65Ldn:

A portion (20 buildings) of the University of Louisville Belknap Campus
The Adath Israel Cemetery
*Eastern Parkway
*Kentucky Fair and Exposition Center
*Park Boulevard Mini-Park
*Robin Park
*Wren Park
Churchill Park
Minoma Park
Twin Park

Eleven potential National Register sites in South Jefferson County (Five of these eleven potential Na-

tional Register sites are presently exposed to noise greater than 65Ldn.)

(*Indicates facilities currently exposed to noise levels at or above 65Ldn.)

There are eight fewer parks included in the 65 Ldn with the LAIP than the No Action alternative. The No Action alternative would also affect nineteen potential National Register sites in south Jefferson County, Lowell School, the potential National Register Districts, two National Register Districts, and two parkways.

At the times the noise analyses were conducted for the EA and the EIS, there was no legislation to require the airlines to convert from Stage 2 to the quieter Stage 3 aircraft. For this reason, 2010 was used as the time frame for the aircraft fleet operating at Louisville to be all Stage 3. This was based on an expected rate of conversion by phasing out older aircraft. Recent legislation was passed requiring aircraft over 75,000 lbs. to comply with Stage 3 noise levels after December 31, 1999 (or under specific waiver conditions, not later that December 31, 2003) in order to operate in the United States. Based on this requirement, as the percentage of Stage 3 aircraft increases, the 65Ldn contour will recede more quickly, and several properties will drop out of the 65Ldn no later than 2003; however, the following properties will be within the 65Ldn contour after the fleet is all Stage 3:

Adath Israel Cemetery
One potential National Register Site
on South Park Road
Kentucky Fair and Exposition Center

Park Boulevard Mini-Park
Twin Park

The RAA has committed to sound attenuate the site on South Park Road as well as the buildings on the University of Louisville campus. No mitigation is proposed for the cemetery, Eastern Parkway, or the remaining parks. The Louisville Parks Board passed a resolution that there was no "use" of these parks by the effects of the proposed project (Appendix A-22). Similarly, the State Fair Board passed a resolution that the noise impacts did not constitute a "use" of the Fairgrounds (Appendix A-24). The FAA has determined under its Section 4(f) obligations, that there was no "use" or "taking" of the six parks and the Kentucky Fair and Exposition Center. The RAA has committed to do a Part 150 study if the LAIP is approved. The potential historic sites would be evaluated in conjunction with that study, but no specific mitigation is proposed at this time.

The Falls of the Ohio National Wildlife Refuge, while well beyond the 65Ldn contour, will be expected to experience a slight increase in noise with the proposed project. The FAA considers the level and the amount of noise increase at that location (an increase of approximately 5Ldn above the current 50Ldn) to be insignificant.

The FAA concludes that, while there are parks and historic sites affected by noise from the proposed project, planning has been incorporated in the project to minimize or mitigate the impacts, that the impacts are less with the proposed project than without the project (with the exception of the Falls of the Ohio National Wildlife Refuge), and that there is no feasible and prudent alternative to the proposed LAIP

that would provide greater relief (except closing Standiford Field).

E. *WETLANDS.*

Approximately 19 acres of hardwood deciduous forest would be taken to construct the new west runway and taxiway. The FAA finds that there is no reasonable and prudent alternative to this impact, it having been minimized in the project design. However, under current policy for a two-for-one replacement, the replactment would be in-kind, off-site. A site of approximately 140 acres in Southwest Jefferson County has been identified as the preferred site by the Division of Water, Department of Fish and Wildlife Resources, the U. S. Army Corps of Engineers and the RAA. The mitigation plan includes the planting of trees to reestablish a hardwood, palustrine deciduous forest wetland. The restoration project will: (1) yield a wetland wildlife habitat that will enhance the water quality of nearby urban runoff and (2) provide unique recreational and educational opportunities for the population of the Louisville Metropolitan Area.

F. *SOLID WASTE.*

(1) LANDFILL

As discussed previously, because of the proximity of the landfill to Standiford Field, a special survey of bird activity of the area was conducted by the Animal Damage Control section of the Animal and Plant Health Inspection Service (APHIS-ADC) U. S. Department of Agriculture (USDA). The conclusion was that the airport/landfill relationship can remain compatible by continuing and enhancing proper bird control techniques. A permanent Wildlife Haz-

ard Management Task Force has been formed to provide a formal, continuing framework for addressing and resolving potential hazards associated with all bird and animal activities in and around the airport.

(2) HAZARDOUS SUBSTANCES

The RAA will acquire those properties containing hazardous waste sites either under threat of condemnation or through condemnation and, thus, would qualify as an "innocent landowner" under the definition in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq. An "innocent landowner" is not liable as owner of operator under Section 107(b)(3) because of the exempted third party contractual relationships in Section 101(35)(A)(11).

The RAA, as an "innocent landowner" will off-set or recover the costs of cleanup from other potentially responsible parties (PRPs). Most of the landowners of properties identified in the EIS as having hazardous waste sites are proceeding with remediation and will have effected the cleanup before the property is acquired by RAA. While it is estimated that the cost of cleanup of the hazardous waste site is well within the value of the properties, should cost exceed the value of the property, by law it will be borne by the property owner and/or the party or parties responsible for creating the contamination.

A number of actions were taken during the refinement of the LAIP which minimize the acquisition of potentially contaminated/hazardous waste sites into the project. First, the west runway was shifted 800 feet to the east from its originally proposed alignment. This action moved the construction and clear zones

away from the area of highest contamination at the Brown Wood Preserving site and adjoining properties. Also, the reconstruction of Crittenden Drive, which would require acquisition of a portion of the Brown property with the heaviest contamination, has been postponed until the property is cleaned up by the owner. These actions keep the RAA off the chain of title, limit RAA's exposure to liability, and provide the Brown Foundation time to take remedial action in the area.

Additionally, the shift of the west runway also avoided the displacement of the major industrial area to the west of Crittenden Drive. Two sites in this area were of particular concern. The first, United Catalyst, is a manufacturer of chemical catalysts used in steelmaking processes. The other, Reliance Universal, which was opened in the early 1940's, is involved in the manufacture of industrial coatings and resins. In the manufacturing process, toluene, xylene, keytones, acetone, and naptha type solvents and titanium oxide and chromium pigments are used. There are 25 to 30 solvent storage tanks on site. By shifting the west runway, both of these sites were avoided by the LAIP.

On the east side of the airfield, an access road, which eventually became the mid-field access road, was added to prevent the projected relocation of the DeVoe factory. This plant mixes raw materials to produce various types of paint. Several storage tanks for solvents and liquids used in the processes are located on site.

Other sites identified as having potential contamination were studied. None of these could be avoided. However, none of the identified sites is believed to

have cleanup costs greater than the resources available to the owner to remediate the property, as discussed in Section 5 of the EIS.

The detailed remediation plans for each site have yet to be developed. As mentioned above, most owners will have already accomplished the remediation when the RAA acquires the property. The remediation plans will comply with applicable Federal, state, and local requirements. Even though the detailed remedial actions have not been fully developed, sufficient investigation has been accomplished to identify the type of contaminants, a reasonable estimate of the extent of contamination, alternatives for remedial actions, and a reasonable estimate of the cost to remediate. It may be concluded that the remediation will not prevent the construction of the essential elements of the LAIP in a timely manner, though the reconstruction of Crittenden Drive will be delayed for at least 10 years. No project actions or remediation will be taken that would render less effective any appropriate alternative method of remediation unless and until the method pursued is approved and determined to be effective.

G. *CONSTRUCTION—SHORT TERM EFFECTS*

"Maintenance of Traffic" plan will be developed prior to construction to minimize inconvenience during construction. Other construction impacts (air, noise, and water pollution) will be minimized through strict adherence to pollution control provisions of FAA Advisory Circular 150/5370-10 *Standards for Specifying Construction of Airports* and the "Kentucky Department of Transportation Standard Specifications for Road and Bridge Construction." Measures for pollution control included in the construction plans and

specifications will be subject to review under the 401 water quality certification process and the states air quality permit process.

H. *MITIGATION MEASURES NOT ADOPTED*

Other mitigation measures that were considered but not adopted are as follows:

An agreement to restrict air traffic to the east runway during performances of "Shakespeare in the Park." This is being rejected as too restrictive on airport demands and capacity when it occurs during a peak traffic period. While this might be possible at times, FAA should not be locked into a unwise and premature commitment that would only be a significant problem later. Central Park is not within the 65 Ldn contour where cumulative noise is greatest. The FAA will continue to work with RAA and the community to provide additional relief whenever its possible and prudent.

Mitigation in the 65 to 70 Ldn contour in 1995 is not planned at the present time. Mitigation within the 70 to 75 Ldn contour was rejected because of the large areas and cost involved and the time required to implement it. FAA's position is that the noise contours will recede as more Stage III aircraft are put in use and that mitigation to correct short-term impacts is not considered prudent, cost efficient, or affordable. This would be reevaluated in the Part 150 study.

VI. *RELATED ISSUES*

A. Kentucky Supreme Court Decision of October 18, 1990.

This Section addresses the Kentucky Supreme Court ruling of October 18, 1990, in *Prestonia Area Neigh-*

*borhod Association v. Abramson*, voiding the urban renewal ordinances passed by the City of Louisville for the areas known as Highland Park, Prestonia, and Standiford.

The following documents related to this matter are included in the FEIS: (1) Kentucky Supreme Court Ruling of October 18, 1990; (2) Legal Memorandum from Wyatt, Tarrant & Combs dated October 23, 1990; (3) Ordinance No. 113, Series 1989, As Amended; and (4) Interlocal Cooperation Agreement dated May 1, 1989.

It is stated a number of times in the FEIS (and the EA before it) that the relocation of incompatible uses (homes, churches, neighborhood businesses) is not part of the LAIP and is not dependent or contingent upon the LAIP (e.g., refer to Section 1.5 of the FEIS). Additionally, it is indicated that the relocation of incompatible uses in the three urban renewal plan areas is being accomplished separately and independently from the RAA (the LAIP project sponsor). Likewise, the FEIS indicates that elimination of incompatible land uses within these three areas is consistent with the authority and objectives under Kentucky statutes (see Section 5.3.1.1).

The FAA has been advised by counsel on behalf of the airport sponsor that local governing bodies have the statutory authority to acquire property for urban renewal purposes (KRS Chapter 99), and the authority to acquire property necessary for establishing, operating, or expanding an airport including airport facilities (KRS Chapter 183). The city of Louisville, Jefferson County, and the RAA determined that much of the existing development surrounding the existing airport, as well as the proposed airport, was incom-

patible with current and future uses of the airport. They determined that it was to their mutual advantage to establish a land use program within the residential neighborhoods known as Highland Park, Prestonia, and Standiford. To accomplish this land use program, the City of Louisville, County of Jefferson, RAA, and the City of Louisville Public Properties Corporation (a separate agency designated to administratively manage and control the Land Use Program) entered into an Interlocal Cooperation Agreement, was to subject the property to airport servitudes in order to restrict the use and occupancy thereof to uses compatible with airport operations and to provide other airport improvements for airport use.

The actions undertaken under the Land Use Program, as defined in the Interlocal Cooperative Agreement, are:

1. Any and all of the local property within the project area having an incompatible use shall be acquired and cleared of all improvements having an incompatible use.

2. All of the acquired property shall be subjected to the airport servitudes.

3. The acquired property shall be either dedicated or conveyed to the authority for airport use or resold, subject to the airport servitudes, and the proceeds of such resale shall be applied to the additional costs and expenses of the land use program and any other airport improvements and the accomplishment thereby of the public purposes of the parties to the agreement.

4. Airport servitudes shall be acquired with respect to all other lots and lands in the project area by purchase or condemnation.

The City of Louisville and County of Jefferson sold revenue bonds and initiated the land use program independent of the LAIP being considered by RAA. While the two programs are complimentary of each other, neither is dependent upon the other.

Based upon the October 23, 1990, legal memorandum from Wyatt, Tarrant & Combs (bond counsel for city of Louisville), the FAA understands that the facts and circumstances are as follows:

1. The Land Use Program that was established pursuant to the Interlocal Cooperation Agreement and financed by the Bonds does not require or contemplate the use of the urban renewal laws or the city's urban agency to acquire property by purchase or condemnation. The Land Use Program was established based on finding by the city and the County that did not depend on the presence of blight. No action to acquire any of the numerous homes, churches, and businesses at a cost of approximately $50,000,000 has been taken under the urban renewal powers, authority, or law under KRS Chapter 99. All funding and, therefore, all actions to acquire property with such funding have been under KRS Chapter 183, "Aviation," and the $59,430,000 bond issue was also based on that statute.

2. The Interlocal Cooperation Agreement was signed by all four governmental parties and was approved by the Board of Aldermen of the City, the Fiscal Court of the County, the RAA Board, and the Board of Directors of the Public Properties Corporation. The Interlocal Cooperation Agreement was also approved as to legality by the City Law Department, the County Attorney, the RAA's general counsel, and the Public Properties Corporation's general counsel. The Interlocal Cooperation Agreement was also ap-

proved as to legality by the Attorney General of the Commonwealth pursuant to KRS 765.260.

3. The Supreme Court of Kentucky decision issued October 18, 1990, regarding the urban renewal plans of the City of Louisville and Jefferson County did not address the bond issue, the Interlocal Cooperation Agreement, or the land use program. The final paragraph on page 10 of the Kentucky Supreme Court opinion states:

> "The judgement of the trial court is reversed and Ordinances Nos. 114, 115, and 116, Series 1989, of the City of Louisville are hereby declared unconstitutional, invalid, and void. This matter is remanded to the trial court for entry of a judgment in accordance with the terms of this Opinion and for the purpose of issuing a permanent injunction to prevent Appellees from demolishing or destroying properties pursuant to the urban renewal plan and project described in each Ordinance, or the otherwise act under the power of the Ordinances hereby voided."

The FAA understands that the Ordinances Nos. 114, 115, 116 relate to urban renewal but legal authority for the bond issue, the Interlocal Cooperation Agreement, and the land use program has not been challenged and was not affected by the court's decision.

In light of the Kentucky Supreme Court decision, the FAA has been assured by the airport sponsor that the City of Louisville and Jefferson County, Kentucky, have the statutory authority to acquire property in the neighborhoods adjacent of Standiford Field under KRS 83.420; KRS 82.082; KRS 67.083; KRS 65.210 to KRS 65.300; KRS Chapter 183; the Interlocal Cooperation Agreement dated May 1, 1989 (between the

City of Louisville, Jefferson County, the RAA, and the City of Louisville Public Properties Corporation); Ordinance No. 3, Series 1989, of Jefferson County Fiscal Court; and Ordinance No. 113, Series 1989, of the City of Louisville. Therefore, it appears that there is sufficient legal authority to proceed, as described and analyzed in the FEIS, to eliminate incompatible land uses in the three areas without the authority voided by the Kentucky Supreme Court. The FAA has also been informed that this authority is, in fact, the authority used to fund the acquisition and relocation of all properties in these three areas to date. Through this authority, the City and County have already acquired 69% of all residential structures (total of 1,388) and 100% of all churches (14). Closing on contracts for the purchase of residential units have continued since the Supreme Court decision. Because the FEIS assumed such acquisitions would occur prior to operation of the new parallel runways, current circumstance substantially correspond to the forecasts and assumptions made in the FEIS. The FAA has been assured the assumptions and forecasts will be achieved.

As noted by the Court, its decision does not affect the proposed LAIP. The Kentucky Supreme Court states, on page two of its opinion, that ". . . the decision in this case does not determine whether or not Standiford Field may be expanded." The RAA's LAIP and the City/County land use program for eliminating incompatible land uses are separate, but complementary. The RAA was not a party to the law suit and is a separate, autonomous, local governmental entity. The FAA has been assured that RAA is empowered under KRS Chapter 183 to acquire property by contract, lease, purchase, gift, condemnation, or otherwise, for

public uses, including establishing, operating, or expanding airports and air navigation facilities, as needed for the proposed airport expansion project.

While the elimination of the incompatible land uses in these three areas is not part of the LAIP and is not dependent on it, nonetheless it is supported by the RAA, as a party to the Interlocal Cooperation Agreement, as a means of achieving compatible land uses in the airport area. The FAA supports efforts to achieve compatibility between the community land use and the local airport. Federal Aviation Regulations Part 150 provide the regulatory basis for this policy as it relates to airport noise. Eventually, the LAIP will require the RAA to acquire some of the land in each of the three areas, both for the runways and for relocation of airport-related businesses such as air cargo services, rental car agencies, and other airport-related uses (see Section 2.5 of the FEIS). Where the property in the three areas is needed for actual airport expansion, the RAA will purchase the property from the then owner in accordance with 49 CFR, Part 24, US Department of Transportation. "Relocation Assistance and Land Acquisition in Federally-Assisted Programs." Such commitments are made in the FEIS (see Section 1.5 of the FEIS) and will be reflected in any future grants for the project. These commitments remain viable after the Supreme Court decision.

The local land use program allows the RAA to acquire those areas needed for the airport uses described in the FEIS. It also provides for appropriate aviation servitudes to be placed on the remaining property, restricting that property and assuring its future uses are compatible with the airport environs.

The conditions articulated in Section 5.3.1.1 of the FEIS remain viable. The FEIS describes the impacts

of the LAIP in each of the categories required to be analyzed, and fully discloses and analyzes the impacts of the land acquisition program even though they are not part of the LAIP. The Kentucky Supreme Court's decision in the *Prestonia* case will not change any of those impacts attributable to the proposed project.

Therefore, based upon its review of the facts and circumstances as described above, the FAA finds that the RAA has provided its assurances that:

1. There is sufficient legal authority outside of the Kentucky urban renewal statute (KRS Chapter 99) to proceed with the relocation of incompatible land uses in the three areas around Standiford Field, as described in the FEIS.

2. The Louisville Airport Improvement Program and the Local Land Use Program (heretofore designated Urban Renewal Progam) actions and results, as described in the FEIS, will each be achieved and remain distinct but complementary programs.

3. Financial commitments of $50,000,000 each have been made by the City of Louisville (together with Jefferson County) and the State of Kentucky toward the LAIP. With these major commitments of financial resources along with the anticipated federal financial assistance through the Airport Improvement Program, provide reasonable assurance that RAA, the City of Louisville, and Jefferson County have the financial capability to complete the land use program currently underway.

4. The decision of the Kentucky Supreme Court in the *Prestonia* case does not cause any material change in any facts or conclusions in the FEIS, including those relating to (1) the number of properties which

will be acquired, (2) the timing of such acquisitions, (3) the number of dwelling units or people within any noise contour in any year, (4) the involvement of the RAA in property acquisition, or (5) the environmental and other impacts of the LAIP or any aspect of property acquisition.

Since the Kentucky Supreme Court decision did not determine whether or not Standiford Field may be expanded or affect the authority of RAA, and, in light of: (1) the authority of RAA to acquire property and develop, operate, and maintain an airport; (2) RAA's will and commitment to take actions and achieve the results described and analyzed in the EA/EIS; and (3) the availability of adequate funds to RAA to accomplish those actions, the FAA believes that may rely on the assurances made by the RAA.

VIII. *SPECIAL FINDINGS.*

A. *The project is reasonably consistent with existing plans of public agencies for development of the area.*

The proposal was cleared by the Kentucky State Clearinghouse by letter of March 27, 1989 (see FEIS, Appendix Page A-1) stating "review of this proposal indicates there are no identifiable conflicts with any state or local plan, goal or objective. Therefore, the State Clearinghouse recommends this project be approved for assistance by the cognizant federal agency."

B. *Fair consideration has been given to the interest of communities in or near the project location.*

All communities have had the following opportunities to express their views:

| | |
|---|---|
| Public Workshops: | 10/20/88, 1/26/89, 3/16/89 |
| Pro scoping meeting: | 10/20/88 |
| Public Hearings (3): | 8/31/89—Written comments were received until 9/18/89. |
| Notice of Intent to Prepare DEIS: | 1/26/90 |
| DEIS Availability Notice: | 5/25/90 |

Comments received during this process were available for review or are contained with the DEIS/FEIS documents. All comments were cor sidered.

C. *Appropriate action has been or will be taken to restrict to the extent reasonable, the use of land in the vicinity of the airport to purposes compatible with airport operations.*

The Airport Sponsor, Regional Airport Authority, is required in every grant application to furnish a statement on compatible land use, and each grant issued to RAA contains an assurance on compatible land use. RAA has agreed to an effective noise mitigation program and will supplement its effort by undertaking an FAR Part 150 noise compatibility planning study which will involve all jurisdictions and include additional land use controls by surrounding communities to control future noncompatible development. RAA does not have the authority to control land use and must rely on surrounding communities to control noncompatible development. Hence, their participation and cooperation is essential to ensuring that future airport noise compatibility programs are implemented.

D. *Appropriate air and water quality certificates will be obtained for the project in accordance with established procedures.*

The Governor of Kentucky has certified by letter dated September 12, 1990, that "there is reasonable assurance that the expansion of Standiford Field including the development of two new runways, as proposed by the Regional Airport Authority of Louisville and Jefferson County, will be located, designed, constructed and operated so as to comply with applicable air and water quality standards." See page A-105 of FEIS appendix.

E. *There is no feasible and prudent alternative to the location of the airport and runways and all reasonable steps have been taken to minimize adverse effects.*

Pursuant to Section 509(b)(5) of the Airport and Airway Improvement Act of 1982, this Record of Decision highlights the FAA's consideration of alternatives and decision-making considerations as well as mitigation measures related to the location of the airport and runways.

F. *There is no feasible and prudent alternative to the use of lands subject to Section 4(f) and all possible planning to minimize harm to such lands resulting from such use has been included.*

"Use" of Section 4(f) land is limited to:

Grove Park and Highland Park Community Center; Lowell School; and the residence at 2111 South Park Road.

The FAA has effected a Memorandum of Agreement (MOA) with the ACHP stipulating the details asso-

ciated with mitigation efforts identified for Lowell School and the residence at 2111 South Park Road (see FEIS Appendix A-97). The FAA has determined the mitigation measures agreed to between the RAA and local authorities for Grove Park and the Highland Park Community Center (see Appendix A-103), reduce adverse effects of the project on these properties to the maximum extent reasonably possible to achieve.

K. *Hazardous Waste*

Since the project requires the acquisition or use of land that includes eight major and several minor hazardous waste sites, the RAA will complete the ongoing remedial investigations, develop a remedial plan, and clean up these sites pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 et seq. The estimated costs of clean-up will be obtained by the RAA from the current owners of the respective sites either [1] through purchase under threat of condemnation or through condemnation. Any additional costs of clean-up will be recovered from the current [2] or former property owners or other parties potentially responsible under Section 107 of CERCLA. Hazardous substances or contaminated soils at those sites will be removed or contained in accordance with applicable federal, state, and local laws.

IX. *DECISION*:

Having carefully considered the air transportation system and airport capacity and the aviation safety and operation objectives of the proposed project in the light of the various aeronautical factors and

judgments presented, as well as being properly advised as to the anticipated environmental impacts of the proposal, under the authority of the Administrator delegated to me, I find that the project is reasonably supported and should be processed for FAA approval for federal assistance and the subsequent procedures involving grant application, grant offer and grant acceptance. This decision, as well as subsequent approval of the project for federal assistance, constitutes an order of the Administrator reviewable in the Circuit Court of Appeals in accordance with Section 1006 of the Federal Aviation Act of 1958, as amended.

APPROVED:

/s/ Garland P. Castleberry — 1/7/91
GARLAND P. CASTLEBERRY — Date
Regional Administrator
Southern Region, Federal Aviation Administration
U.S. Department of Transportation

Attachment

# ATTACHMENT

## LIST OF REPORTS FOR THE RECORD

*Evaluation of Airport Facility Needs at Standiford Field*, June 1988

*Environmental Assessment for the Louisville Airport Improvement Program (EA/AIP)*, December 1989

*Final Environmental Impact Statement*, November 1990

*Final Report on Airport Master Plan Site Selection for a New Airport*, 1975, Louisville and Jefferson County Air Board

*Technical Report: Aviation Activity Forecasts for Standiford Field*, Louisville, Kentucky, 1978, Peat Marwick Mitchell and Company

*Technical Report: Analysis of Airfield Capacity and Delays on Standiford Field*, Louisville, Kentucky, 1978, Peat Marwick Mitchell and Company

*Technical Report: Passenger Terminal Platform Planning Criteria for Standiford Field*, Louisville, Kentucky, 1978, Peat Marwick Mitchell and Company

*Technical Report: Alternate Terminal Platform Site Analysis or Standiford Field*, Louisville, Kentucky, 1978, Peat Marwick Micthell and Company

*Summary Report: New Airside Building for Standiford Field*, Louisville, Kentucky, 1983, Peat Marwick Mitchell and Company

*Technical Report: Airfield Capacity Study—Standiford Field*, 1985, Peat Marwick Mitchell and Company

*Final Letter Report: Preliminary Analysis of Potential New Runway*, Standiford Field, 1987, Peat Marwick Company

*Airline Traffic Analysis*, 1987, Peat Marwick and Main repared as part of 1987 Series A Bond Issue)

Technical Report No. 1—*Forecast of Aviation Activities*

Technical Report No. 2—*Evaluation of Alternatives*

Technical Report No. 3—*Selection of Preferred Alternative*

Final Report—*Evalaution of Airport Facility Needs at Standiford Field*

Working Paper No. 1—*Airport Improvement Alternatives*

Working Papers No. 2 and 3—*Effects and Costs of Airport Improvement Alternatives*

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No. 92-231

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

COMMUNITIES, INC.; DULWORTH & RIVES, INC.,

*Petitioners,*

v.

JAMES B. BUSEY, Administrator, Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION,

*Respondents.*

and

COMMUNITIES, INC.,

*Petitioner,*

v.

SAMUEL K. SKINNER, Secretary of the United States, Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondents,*

REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY,

*Intervenor-Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## OPPOSITION OF RESPONDENT THE REGIONAL AIRPORT AUTHORITY OF LOUISVILLE AND JEFFERSON COUNTY, KENTUCKY

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## REASONS FOR DENYING THE WRIT

Petitioners invite this Court to substitute their own view of the facts and their own judgments for those of the Federal Aviation Administration ("FAA"). The Petition is an extended quibble over facts, and judgments about facts, which are within the technical expertise of the FAA. It has little to say about errors of law by the FAA or the Court of Appeals.

Intervenor-Respondent Regional Airport Authority of Louisville and Jefferson County, Kentucky ("RAA") owns and operates the airport which is the subject of this case. To avoid duplication with the Brief in Opposition to be filed by the Solicitor General on behalf of the FAA and other federal respondents, the RAA limits this Brief to three points within its special knowledge:

(1) Petitioners' major premise – that cargo operations are not growing at the airport – is wrong. As the Court of Appeals stated, cargo operations are growing. Current information confirms that they still are growing.

(2) The land acquisition program which Petitioners claim should have been analyzed as part of the airport project has always had utility independent of the airport project, was started and will be completed with or without the airport project, was 69% complete when the Court of Appeals heard this case, and is approximately 80% complete today. Its environmental impacts are fully disclosed in the Final Environmental Impact Statement ("FEIS").

(3) The alternatives preferred by Petitioners were rejected for sound reasons of airport design and operation fully set forth in the administrative record. The alternative most enthusiastically endorsed by Petitioners as a feasible and prudent alternative for NEPA[1] and § 4(f)[2] purposes (Alternative 4) cannot be built. It would close the only sanitary landfill serving Louisville and its surrounding counties. Petitioners have never said where the garbage is supposed to go.

The FAA looked closely at each of these questions, reviewing the facts and technical judgments of experts and relying on its own expertise in matters of airport capacity and design. The Court of Appeals reviewed the record and found that the FAA's expert determinations were not arbitrary and capricious.

### A. No Reason Exists Pursuant to Rule 10 To Grant A Petition for Writ of Certiorari

Supreme Court Rule 10 identifies the "character of reasons" which may, in the Court's discretion, support the issuance of a writ of certiorari. None is remotely present here. Neither a conflict among the circuits, nor a failure by the Sixth Circuit Court of Appeals to follow this Court's precedents exists. The Court of Appeals, to the contrary, engaged in the requisite NEPA "hard look"

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[1] National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370 (1983).

[2] Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303 (1987).

at the FAA's decision approving the Standiford Field redevelopment, 956 F.2d 619, 626 (A 28-29). Equally properly, the Court, in analyzing Petitioners' challenges to FAA fact-finding, deferred to the administrative agency's expertise in overseeing the national air transportation system.

Finally, no important – but unsettled – question of federal law is raised in the Court of Appeals' decision that would require review by this Court. Rather, the Court of Appeals followed settled standards, articulated by this Court, in reviewing under federal environmental statutes the informed decision of a federal agency.

At bottom, Petitioners' dispute is with the FAA's fact-finding decisions. Such a factual dispute, however, affords no basis for issuance of a writ of certiorari.

Having identified no substantial issue of law requiring this Court's review in any of the bases identified in Rule 10, the petition should be denied.

### B. Growing Cargo Operations Justify the Project

The Petition argues that the project is not needed because cargo operations at Standiford Field are not growing. That major premise is wrong.

Standiford Field is the eighth busiest cargo airport in the world because it is the principal hub for United Parcel Service ("UPS"), one of the largest cargo airlines in the United States. UPS's overnight cargo service requires all-weather ability to have many aircraft land in a short period of time and have those same aircraft depart in a short period after packages are sorted. The FEIS notes

that "because there is very little flexibility in UPS operations, this airline needs to be assured that capacity limitations in bad weather will not constrain their operations." (FEIS, p. 2-11) The FAA found that the project is required to provide that capacity.

Improving this airport will provide a modern cargo hub airport and will preserve more than 6,000 Kentucky jobs, and promise many more. UPS is Louisville's second largest employer. This project is essential to the economic future of Louisville and northern Kentucky, as well as to the efficient movement of freight throughout the United States.

Petitioners tell this Court that cargo operations are not growing. The Court of Appeals, after reviewing the administrative record, disagreed:

> UPS's operations have caused a dramatic growth in both express and air cargo aircraft operations; in four years, express cargo volumes have increased almost fivefold.

*Communities , Inc., et al.* v. *Busey, et al.*, 956 F.2d 619, 621 (6th Cir. 1992) (A 7). Petitioners say air cargo operations peaked in 1985 at 36,260 and dropped to 31,400 in 1987. (Pet. 6-7) But the FEIS shows actual cargo operations for the 12 months ending September 30, 1988 to be 42,684. (FEIS, p. 5-4) The administrative record also shows that the FAA was well aware of the growth of the air cargo industry in the United States, and of UPS's key position in that industry. The FAA is required by law to keep track of such things. *See, e.g.*, § 504 of the Airport and Airway Improvement Act, 49 U.S.C. App. 2203 (1990).

The legal test is whether the FAA acted in a non-arbitrary manner in estimating future cargo operation levels. *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-76, 109 S. Ct. 1851, 1861 (1989). Forecasting is an imperfect science and a court will uphold agency forecasts that are not unreasonable. *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1544 (11th Cir. 1990); *Piedmont Heights Civic Club* v. *Moreland*, 637 F.2d 430, 442 (5th Cir. 1981). *See also Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 198-99 (7th Cir.) (discussing airport demand forecasts), *cert. denied*, 479 U.S. 847 (1986).

Not only were the FAA's estimates reasonable at the time they were made and supported amply in the record, but subsequent experience proves the FAA to have been correct. Cargo operations continue to grow at this airport, although at a rate slightly less than FAA forecast and despite the temporary effects of the national economic downturn. While not in this record, RAA advises that for the 12 months ending June 30, 1992, there were more than 46,368 cargo operations at Standiford Field. FAA's expert and informed finding, in this record, that cargo operations at this airport would continue to grow has been confirmed by daily reality at Standiford Field.

Much of the Petition rests on the premise that "the record of airline cargo operations, when subjected to the required 'hard look' does not support the FAA conclusion that the expansion is needed." (Pet. 6) That premise is contradicted by the facts in the FEIS and by actual experience at the airport. This Court is presented with the same sort of issue it faced in *Marsh*, where this Court said:

> The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. . . . [R]esolution of this dispute involves primarily issues of fact. Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies."

490 U.S. at 376-77, 109 S. Ct. at 1860-61 (footnote and citations omitted). This is a dispute about the FAA's determination of facts within its expertise – facts which have been confirmed by subsequent reality. The Court of Appeals' opinion holding that the FAA decision is not arbitrary conforms to the principle articulated in *Marsh*.

### C. The Land Acquisition Program Is Independent of the Airport Project and Is Nearly Complete

Petitioners insist that the land acquisition program, which is displacing residents of three neighborhoods in the airport area, is part of the airport project. They think the FAA's NEPA analysis mistakenly considered these homes to be gone whether the project went forward or not. The court below disagreed, after reviewing an exhaustive analysis of this issue by the FAA and Petitioners. The argument is hollow today because the neighborhood associations, which represent the displaced homeowners and were once parties to this case, voluntarily withdrew before argument in the Court of Appeals. *Communities*, 956 F.2d at 622, n. 1. (A 11, n.1).

The land acquisition program was designed to eliminate residences which are heavily impacted by existing

airport noise. Some of these residences are located *between* two busy air carrier runways; others are at runway ends. These homes are in areas of severe airport impact.

Strictly local funds were raised to buy these residences. The Court of Appeals reviewed the exhaustive record on this question and said:

> With or without the expansion of SDF, the governments of Louisville and Jefferson County have been and remain committed to removing certain residential properties from the three neighborhoods near SDF that are currently heavily impacted by aircraft noise. They have demonstrated that commitment by moving ahead with a land acquisition program – using strictly local money – long before there was any assurance that the airport project would, or could, be built.

956 F.2d at 626. (A 31). The responsible local governments unconditionally told the Court of Appeals that the properties would be acquired by the target date set forth in the FEIS. (Brief Amicus Curiae of City of Louisville, Kentucky and Jefferson County, Kentucky filed in the Court of Appeals.) The Court of Appeals noted that 69% of the properties had already been acquired as of the date of the FAA's order. 956 F.2d at 621, 626 (A 8-9, 31).

Since this submission in the Court of Appeals, the percentage of residences acquired has grown to approximately 80%. Litigation opposing residential acquisitions has been settled. Local proceedings to determine values and other payments are in progress. There is no remaining litigation seeking to stop completion of the residential

acquisition program and, to the knowledge of RAA, none is threatened.

NEPA requires analysis of the real world. The FAA concluded, as did the Court of Appeals, that these residences would be acquired with or without the airport project. The record amply supports that conclusion. Nothing in NEPA required FAA to analyze a fantasy world in which those residences would not be acquired.

### D. The Alternatives Petitioners Prefer Are Not Feasible or Prudent

Petitioners told the Court of Appeals that airport expansion is "generally meritorious." (Brief of Petitioners in the Court of Appeals, p. 44) They agree with the broad local consensus in Louisville that Standiford Field should be improved. But Petitioners want the proposed expansion to be redesigned so that the impacts of the project to which they object will be visited on someone other than themselves. They proffer their layman's view of airport design as a substitute for the FAA's expertise.

Petitioners concede that the alternative to the proposed project which they most prefer (Alternative 4) would require closing of the only sanitary landfill serving Louisville. They argue that "the closing of a landfill required for Alternative 4 is a reason to prefer, not to reject the alternative." (Pet. 26) Quite aside from the special engineering problems of building a safe runway on a landfill, that proposition is true only if there is an alternative landfill.

But Petitioners have never said where the replacement landfill should be, or even said that there *is* a suitable place for one. Petitioners are so completely focused on airport impacts which they perceive as bad for them, that they have overlooked the need for Louisville to put its garbage someplace. Without a plausible alternative site for a new landfill, use of the only existing landfill for a runway is not feasible or prudent.

The Petition devotes several pages to providing this Court with inexpert opinions on airport safety and efficiency. (Pet. 28-29) Petitioners offer curbstone arguments for alternatives to the project, lecturing the FAA and this Court on such matters as separation of cargo and passenger operations and operational flexibility. They also believe that UPS misunderstands its own self interest and has endorsed the wrong project.

These are the kinds of questions on which this Court has deferred to agency expertise. *Marsh, supra*. The FAA found that the alternatives which Petitioners prefer will not serve the transportation goals of the project and therefore are neither feasible nor prudent for NEPA or § 4(f) purposes. Neither would provide the needed runway capacity for cargo hub operations. Neither would be built because neither makes sense. That is why the FAA, after review of the extensive record, rejected them.

The Court of Appeals found that the "reasons for deeming the other alternatives infeasible were fully explained." 956 F.2d at 627 (A 34). Petitioners offer nothing but their layman's views of technical issues to challenge that conclusion.

## CONCLUSION

Petitioners have their facts wrong on cargo operations: cargo activity is growing not declining at Standiford Field. Petitioners have their facts wrong on land acquisition: it already is – and will continue to be – a reality with or without the airport project. Petitioners have their facts wrong on alternatives: their preferred alternatives are neither feasible nor prudent.

Most important, these fact-intensive issues – initially resolved by the FAA and upheld by the Court of Appeals – provide no proper basis for seeking the extraordinary review of this Court.

RAA respectfully requests that the petition for issuance of a Writ of Certiorari be denied.

Dated: October 2, 1992

Respectfully submitted,

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